

**CALIFORNIA CASE LAW
CONCERNING
HOMEOWNERS ASSOCIATION
RESTRICTIONS AND RULES**

Residential Overcrowding Workshop

Thursday, April 30, 2009 - 6:00 p.m.

**City Council Chambers
32400 Paseo Adelanto
San Juan Capistrano, CA**

MISSION SHORES ASSOCIATION, Plaintiff and Respondent, v. DAVID PHEIL, Defendant and Appellant.

E043932

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

166 Cal. App. 4th 789; 83 Cal. Rptr. 3d 108; 2008 Cal. App. LEXIS 1395

September 5, 2008, Filed

PRIOR-HISTORY:

APPEAL from the Superior Court of Riverside County, No. INC065504, H. Morgan Dougherty, Judge.

COUNSEL: Law Firm of Kaiser & Swindells, Raymond T. Kaiser and J. Rodney DeBiaso for Defendant and Appellant.

Peters & Freedman and Laurie S. Poole for Plaintiff and Respondent.

JUDGES: Opinion by Hollenhorst, J., with Ramirez, P. J., and King, J., concurring.

OPINION BY: Hollenhorst

OPINION

HOLLENHORST, J.—David Pheil (Pheil) appeals a trial court order that reduced the percentage of votes necessary to amend the Mission Shores Association's (the Association) declaration of covenants, conditions and restrictions (CC&R's). (Civ. Code, § 1356.) Pheil challenges the order on the grounds the trial court erred in finding that (1) the amendment was reasonable (§ 1356, subd. (c)(5)); (2) the balloting conformed to the CC&R's (§ 1356, subd. (c)(2)); and (3) there was no impairment to the security interest of mortgagees (§ 1356, subd. (e)(3)). We affirm the order.

FOOTNOTES

1 All further statutory references are to the Civil Code unless otherwise indicated.

I. PROCEDURAL BACKGROUND AND FACTS

The Association is the homeowners association which governs the Mission Shores common interest development (Mission Shores) located in Rancho Mirage and consisting of 168 separate interests (Homes), in addition to common areas and facilities. On May 12, 2004, the CC&R's were recorded for the development.

In 2004, Pheil and his wife decided to purchase a vacation home in Rancho Mirage. At Mission Shores, the developer's agent represented to Pheil and his wife that they would be allowed to rent or lease a home without restriction. According to the applicable CC&R's, an owner may rent to a single family where the rental agreement is in writing and subject to the CC&R's. In reliance on the agent's representation, Pheil and his wife purchased a Home, which they rented, on occasion, to others. As a homeowner, Pheil is a member of the Association.

The board of directors for the Association (Board) is composed of five members, three of which were appointed by the developer. The developer owns 11 of the 168 Homes in the development. Concerned with how some homeowners were renting their Homes, on May 19, 2005, the Board

unanimously voted to accept proposed rule 2.10.2 of the CC&R's (Rule 2.10.2), which provided, "No short-term rentals or leases of less than 30 days are allowed." Pheil challenged the rule. This dispute came before Mediator Peter J. Lesser. A July 31, 2006, mediation did not resolve the dispute. On August 23, Pheil, through his attorney, mailed a "Demand for Internal Dispute Resolution" to Attorney James R. McCormick, Jr., an attorney for the Association, with respect to Rule 2.10.2.

In response to the dispute over Rule 2.10.2, the Board decided to amend the CC&R's to provide the same temporal limitation on rentals. Additionally, the proposed amendment granted the Association the right to evict a tenant for breach of the governing documents and to impose the related attorney fees and court costs on the homeowner. On September 28, 2006, the Association mailed a cover letter, voting instructions, official ballot, the proposed amendment to the CC&R's (Amendment), and two envelopes to all members of record of the Association. It presented a "redlined" version of article II, section 2.1 of the CC&R's, showing precisely the language to be added and to be deleted. A deadline of November 13, 2006, was set to return the ballots. The owners were further informed the ballots would be tabulated at the Board meeting on November 15.

Article IV, section 4.4.3 of the CC&R's sets forth the different types of voting "classes." "Class A" consists of members of the Association who own a Home. Of the 168 Homes, 157 had been sold such that there were 157 owner votes. The remaining 11 Homes were still owned by the developer, who was entitled to three "Class B" votes per Home, or a total of 33 developer votes. In order for the Amendment to pass, the Association had to obtain at least 67 percent of the voting power of both classes. Thus, passage of the Amendment required 105 owner votes and 22 developer votes. On November 13, 2006, 132 of the 168 ballots were received. The inspectors of the election opened the ballots and tabulated the results. In the "Class A" category, 93 owner votes were in favor of the Amendment, 28 owner votes were against the Amendment, and 36 owner votes abstained. In the "Class B" category, all 33 developer votes were cast in favor of the Amendment. Because the Amendment garnered only 59 percent of the owner vote, it failed.

On March 8, 2007, pursuant to section 1356, the Association petitioned the trial court for an order reducing the percentage of affirmative votes required for passage of the Amendment and approving the Amendment based upon the number of affirmative votes actually cast constituting at least a majority of each voting class. A hearing date was set for April 9, 2007. The Association filed a notice of hearing, memorandum of points and authorities, and supporting declarations. Notice of the hearing was mailed to each homeowner of record on March 23, 2007.

Pheil opposed the petition, objecting to the imposition of a 30-day minimum for leases on the grounds that this violated an alleged representation made by the developers of the project when he purchased his Home. In reply, the Association stated the reason for the minimum lease term was to prevent use of any Home as a hotel. The Association provided a declaration from its counsel regarding the prevalence of CC&R restrictions containing a 30-day minimum provision.

At the initial hearing on April 9, 2007, the trial court continued the matter to allow Pheil's counsel to obtain copies of the supporting declarations. The second hearing was continued to allow the Association to hold its election of directors to see if the new Board would want to continue pursuing the petition. During the final hearing on May 25, 2007, the trial court indicated its intent to grant the petition.

By order dated June 12, 2007, the trial court found that the Association had complied with the requirements of section 1356, subdivision (c)(1) through (6) and that granting the petition was "not improper" under section 1356, subdivision (e)(1) through (3). Thus, the trial court granted the petition, which reduced the percentage required to amend the CC&R's. Pheil filed the instant appeal.

II. STANDARD OF REVIEW

"[S]ection 1356, part of the Davis-Stirling Common Interest Development Act (the Act), provides that a homeowners association, or any member, may petition the superior court for a reduction in the percentage of affirmative votes required to amend the CC&R's if they require approval by 'owners having more than 50 percent of the votes in the association' [Citation.] The court may, but need not, grant the petition if it finds all of the following: Notice was properly given; the balloting was properly conducted; reasonable efforts were made to permit eligible members to vote; '[o]wners having more than 50 percent of the votes, in a single class voting structure, voted in favor of the amendment'; and '[t]he amendment is reasonable.' [Citation.]" (Peak Investments v. South Peak Homeowners Assn., Inc. (2006) 140 Cal.App.4th 1363, 1366-1367 [44 Cal. Rptr. 3d 892], fn. omitted.)

The purpose of section 1356 is to provide homeowners associations with the "ability to amend [their] governing documents when, because of voter apathy or other reasons, important amendments cannot be approved by the normal procedures authorized by the declaration. [Citation.] In essence, it provides [an] association with a safety valve for those situations where the need for a supermajority vote would hamstring the association." (Blue Lagoon Community Assn. v. Mitchell (1997) 55 Cal.App.4th 472, 477 [64 Cal. Rptr. 2d 81].)

Section 1356, subdivision (c), gives the trial court broad discretion in ruling on such petition. Accordingly, on appeal, we review the trial court's ruling for abuse of discretion. (Fourth La Costa Condominium Owners Assn. v. Seith (2008) 159 Cal.App.4th 563, 570 [71 Cal. Rptr. 3d 299].)

III. WAS THE AMENDMENT REASONABLE?

Pheil contends that because three of the five seats on the Board were held by representatives of the developer, the developer "in fostering the petition was clearly acting for its own purposes and not [those] of the owners." Specifically, Pheil claims there is no evidence that any individual homeowner complained about the rental of a home without temporal restriction. Instead, Pheil notes the evidence is limited to the vague determination by the Board and the self-serving declaration of the Association's attorney. Given the facts that (1) the Board was controlled by the developer who was behind the petition; (2) this was not a case of homeowner apathy; and (3) the trial court's words suggest that it thought the owners were entitled to a representative board, Pheil argues the trial court abused its discretion in finding the Amendment to be reasonable.

Clearly, the Association was charged with the burden of proving the Amendment was reasonable. (Fourth La Costa Condominium Owners Assn. v. Seith, supra, 159 Cal.App.4th at p. 577.) "The term 'reasonable' in the context of use restrictions has been variously defined as 'not arbitrary or capricious' [citations], 'rationally related to the protection, preservation and proper operation of the property and the purposes of the Association as set forth in its governing instruments,' and 'fair and nondiscriminatory.' [Citation.]" (Ibid.)

Here, the Association argued that the need to restrict rentals to 30 days or more was to ensure the property would not become akin to a hotel. Mission Shores is a residential community. According to the Association's attorney, "The overwhelming majority of the [CC&R's] that [she] review[s], both in preparing restated [CC&R's] and reviewing existing [CC&R's], contain[s] provisions regarding minimum lease terms of thirty (30) days or longer" As the trial court noted, "these kinds of restrictions are very common. And ... many counties and cities have these restrictions that essentially when you rent for less than 30 days, you're essentially operating a hotel in a residential district." Furthermore, the court observed, "there is a movement afoot to restrict homes from being on vacation rentals. It is not just in this project. It is throughout California. [¶] So for example ... I have a home in San Luis Obispo County and they have a very strict rule about vacation rentals. I

was just reading in the paper in Palm Springs they're talking about passing a law restricting rentals to only 30 days or more."

"A CC&R is unreasonable if it is arbitrary and capricious, violates the law or a fundamental public policy or imposes an undue burden on property, and it is reasonable unless it meets those criteria. [Citation.]" (Fourth La Costa Condominium Owners Assn. v. Seith, supra, 159 Cal.App.4th at pp. 577-578.) On the record before this court, we cannot find that the imposition of a 30-day minimum lease term is unreasonable. The provision applies to all owners who rent their Homes, the restriction does not violate public policy (see, e.g., City of Oceanside v. McKenna (1989) 215 Cal.App.3d 1420, 1426-1427 [264 Cal. Rptr. 275] [restrictions requiring owner occupancy and forbidding the leasing of units were reasonable in view of the city's redevelopment goals of providing a stabilized community of owner-occupied units for low- and moderate-income persons]), and any burden to enforce the minimum lease term is outweighed by its beneficial value in preserving the residential character of the development.

With cursory argument and no citation to any legal authority, Pheil contends the Amendment is unreasonable because it grants the Association the right to evict tenants for breach of the CC&R's and to impose attorney fees and costs onto the owner. "[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]" (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.) Although we may deem this point waived, we note the Association addressed it on the merits. 2

FOOTNOTES

2 The Association argues that this issue is waived because Pheil failed to raise it in his written opposition. While the Association discounts the fact that Pheil did raise the issue during oral argument before the trial court, we do not.

The Association argues this provision is reasonable. First, the Association notes that associations have been analogized to landlords for purposes of determining tort liability. (Frances T. v. Village Green Owners Assn. (1986) 42 Cal.3d 490, 499-501 [229 Cal.Rptr. 456, 723 P.2d 573].) As such, if an association is held to a landlord's obligations, it should equally benefit from any rights attributed to the landlord. We agree. Second, the Association argues that any tenant should be bound by the CC&R's to the same extent that the homeowner is bound. In the event the homeowner fails or refuses to take effective measures to assure his or her tenant is complying with the CC&R's, the Association needs some means to assure compliance. We agree. Third, according to the Association, the enforcement remedies apply to any and all tenants in breach of the CC&R's, and providing the Association with the right to enforce any breach of the CC&R's does not violate public policy. (See, e.g., 1 Sproul & Rosenberry, Advising Cal. Common Interest Communities (Cont.Ed.Bar 2007 supp.) § 6.45, pp. 423-424.) Again, we agree. Nonetheless, in his reply brief, Pheil claims that commentators have criticized provisions allowing associations the right to enforce the CC&R's against tenants as being "unlawful." Reviewing the practice tip referenced by Pheil, we note the commentators merely caution practitioners to consider the risks involved. Specifically, an association may be liable for wrongful eviction given the fact that the association does not have possession of the property, and thus, is not the rightful party to bring the action. (Id. at pp. 424-425.)

For the above reasons, we find that the trial court did not abuse its discretion in finding the Amendment to be reasonable.

IV. DID THE BALLOTING CONFORM WITH THE CC&R'S?

According to Pheil, subdivision (c)(2) of section 1356 was not complied with because the letter that accompanied the ballot inaccurately portrayed the context of the Amendment and made improper reference to the ineffective rule. In response, the Association argues it complied with the procedures for amending the CC&R's as governed by section 1363.03. According to that section, a secret ballot procedure must be used with a double envelope system, inspectors of the election must be appointed, and the results must be tabulated at a board meeting. (§ 1363.03, subs. (c), (e).) Here, the Association maintains it mailed the Amendment, the ballot, voting instructions, and two envelopes to each of its members. Furthermore, the results were tabulated at the Board meeting.

The Amendment clearly indicated the language to be added and the language to be deleted. Presenting the owners with a redlined version of the proposed Amendment constituted the reasonably detailed form the CC&R's require. While Pheil claims the cover letter accompanying the ballot and other documents misled the owners, we note there is no evidence in the record that supports this claim. Not one owner submitted a declaration claiming he or she voted in a particular way solely due to the information contained in the cover letter. Moreover, as the Association points out, the cover letter highlighted the fact that the Amendment would provide for a 30-day minimum leasing requirement and the ability of the Association to evict tenants. 3

FOOTNOTES

3 The cover letter provided, in part, the following: "The Association's [CC&R's] currently discuss[] rental of residences in a very broad manner. There are few protections afforded to the Owners against tenants who treat the Association not as their personal home, but instead as a weekend party place [¶] Enclosed is a proposed amendment of Article II, Section 2.1 The purpose of the proposed amendment is to further define the rights and obligations of Owners who rent or lease their residences. Among other things and consistent with the current Rules and Regulations, the proposed amendment places a thirty (30) day minimum on any lease and provides the Association with the right, but not the obligation, to evict problem tenants on an Owner's behalf if the Owner refuses to take corrective action."

Notwithstanding the above, Pheil claims the Association failed to give notice of the election results pursuant to section 1363.03, subdivision (g). That section provides, "The tabulated results of the election shall be promptly reported to the board of directors of the association and shall be recorded in the minutes of the next meeting of the board of directors and shall be available for review by members of the association. Within 15 days of the election, the board shall publicize the tabulated results of the election in a communication directed to all members." The Association does not claim that it gave notice of the election results; however, it does claim the results were reported at the Board meeting on November 15, 2006, and recorded in the minutes of the Board meeting (which are available to each member). Thus, the Association argues that it provided the required notice to its members, but even if it had not, the petition was not precluded. We agree with the Association.

Pheil does not oppose the results of the election. Rather, he opposes the Amendment itself. Pheil does not provide any argument or legal citation to any authority as to the consequences which the Association should suffer given its failure to comply with section 1363.03, subdivision (g). Under the circumstances of this case, we find such failure to be trivial. Accordingly, we cannot agree that such failure should result in precluding the Association from proceeding with its petition. Moreover, we cannot find that the trial court abused its discretion in failing to find that the balloting did not comply with the CC&R's.

V. DOES THE AMENDMENT IMPAIR THE SECURITY INTEREST OF MORTGAGEES?

In his final contention, Pheil argues that the CC&R's require approval of 51 percent of first mortgagees who have previously requested notification under two stated circumstances, namely, where any amendment affects the rights or protection granted to mortgagees and where any amendment could result in a mortgage being canceled by forfeiture. He claims the Association failed to give such notice and to obtain such approval. Again, we note that Pheil fails to support his claim with any legal argument with citation of authorities on the points made. His brief reference to section 1356, subdivision (e)(3), is insufficient. Nonetheless, given the fact that the Association addressed the merits of the issue, so will we.

Section 1356, subdivision (e)(3), forbids the court from approving any amendment to CC&R's that impairs the security interest of a mortgagee, if approval of a specified percentage of the mortgagees is required under the CC&R's. According to article XIII, section 13.2.2 of the CC&R's, the following amendments require 51 percent approval of the first mortgagees: "(a) Any amendment which affects or purports to affect the validity or priority of Mortgages or the rights or protection granted to Mortgagees, insurers or guarantors of first Mortgages. [¶] (b) Any amendment which would require a Mortgagee after it has acquired a Lot through foreclosure to pay more than its proportionate share of any unpaid Assessment or Assessments accruing before such foreclosure. [¶] (c) Any amendment which would or could result in a Mortgage being canceled by forfeiture, or in a Lot not being separately assessed for tax purposes. [¶] (d) Any amendment relating to (i) the insurance provisions in Article VIII, (ii) the application of insurance proceeds in Article IX, or (iii) the disposition of any money received in any taking under condemnation proceedings. [¶] (e) Any amendment which would subject any Owner to a right of first refusal or other such restriction, if such Lot is proposed to be transferred." The Amendment does not fall under any item in this list.

In his reply brief, Pheil claims the temporal restriction on renting "clearly impacts the ability of owners to pay their mortgages." However, Mission Shores is a residential development. Pheil has not provided any evidence to the contrary. Other than his claim that he was told he could lease or rent his home and that he thereafter on occasion rented it to others, there is no evidence that he needed to borrow money to purchase his home, that he obtained a nonowner occupied loan, or that he purchased his home with the sole purpose of renting it out to pay the mortgage.

Accordingly, we conclude the trial court did not abuse its discretion in finding that there was no impairment to the security interests of mortgagees.

VI. DISPOSITION

The order is affirmed. The Association is entitled to its costs on appeal.

Ramirez, P. J., and King J., concurred.

NATORE A. NAHRSTEDT, Plaintiff and Appellant, v. LAKESIDE VILLAGE CONDOMINIUM ASSOCIATION, INC., et al., Defendants and Respondents.

No. S029132.

SUPREME COURT OF CALIFORNIA

8 Cal. 4th 361; 878 P.2d 1275; 33 Cal. Rptr. 2d 63; 1994 Cal. LEXIS 4555; 94 Cal. Daily Op. Service 6859; 94 Daily Journal DAR 12534

September 2, 1994, Decided

PRIOR-HISTORY: Superior Court of Los Angeles County, No. WEC144478, Lawrence C. Waddington, Judge.

COUNSEL: Joel F. Tamraz for Plaintiff and Appellant.

Wilner, Klein & Siegel, Leonard Siegel, Laura J. Snoke and Thomas M. Ware II for Defendants and Respondents.

Gerald J. Van Gemert, James A. Judge, Bigelow, Moore & Tyre, James S. Tyre, Musick, Peeler & Garrett, Gary L. Wollberg, Berding & Weil, James O. Devereaux, Bergerson & Garvic and John Garvic as Amici Curiae on behalf of Defendants and Respondents.

Swanson & Dowdall and C. Brent Swanson as Amici Curiae.

JUDGES: Lucas, C. J., Mosk, J., Baxter, J., George, J., and Werdegar, J., concurred.

OPINION BY: KENNARD, J.

OPINION

KENNARD, J.

A homeowner in a 530-unit condominium complex sued to prevent the homeowners association from enforcing a restriction against keeping cats, dogs, and other animals in the condominium development. The owner asserted that the restriction, which was contained in the project's declaration 1 recorded by the condominium project's developer, was "unreasonable" as applied to her because she kept her three cats indoors and because her cats were "noiseless" and "created no nuisance." Agreeing with the premise underlying the owner's complaint, the Court of Appeal concluded that the homeowners association could enforce the restriction only upon proof that plaintiff's cats would be likely to interfere with the right of other homeowners "to the peaceful and quiet enjoyment of their property."

FOOTNOTES

1 The declaration is the operative document for a common interest development, setting forth, among other things, the restrictions on the use or enjoyment of any portion of the development. (Civ. Code, § 1351, 1353.) In some states, the declaration is also referred to as the "master deed." (See *Dulaney Towers Maintenance v. O'Brey* (1980) 46 Md.App. 464 [418 A.2d 1233, 1235].)

Those of us who have cats or dogs can attest to their wonderful companionship and affection. Not surprisingly, studies have confirmed this effect. (See, e.g., *Waltham Symposium 20, Pets, Benefits and Practice* (BVA Publications 1990); *Melson, The Benefits of Animals to Our Lives* (Fall 1990)

People, Animals, Environment, at pp. 15-17.) But the issue before us is not whether in the abstract pets can have a beneficial effect on humans. Rather, the narrow issue here is whether a pet restriction that is contained in the recorded declaration of a condominium complex is enforceable against the challenge of a homeowner. As we shall explain, the Legislature, in Civil Code section 1354, has required that courts enforce the covenants, conditions and restrictions contained in the recorded declaration of a common interest development "unless unreasonable." 2

FOOTNOTES

2 Under Civil Code section 1354, subdivision (a) such use restrictions are "enforceable equitable servitudes, unless unreasonable." Further undesignated references are to the Civil Code.

Because a stable and predictable living environment is crucial to the success of condominiums and other common interest residential developments, and because recorded use restrictions are a primary means of ensuring this stability and predictability, the Legislature in section 1354 has afforded such restrictions a presumption of validity and has required of challengers that they demonstrate the restriction's "unreasonableness" by the deferential standard applicable to equitable servitudes. Under this standard established by the Legislature, enforcement of a restriction does not depend upon the conduct of a particular condominium owner. Rather, the restriction must be uniformly enforced in the condominium development to which it was intended to apply unless the plaintiff owner can show that the burdens it imposes on affected properties so substantially outweigh the benefits of the restriction that it should not be enforced against any owner. Here, the Court of Appeal did not apply this standard in deciding that plaintiff had stated a claim for declaratory relief. Accordingly, we reverse the judgment of the Court of Appeal and remand for further proceedings consistent with the views expressed in this opinion.

I

Lakeside Village is a large condominium development in Culver City, Los Angeles County. It consists of 530 units spread throughout 12 separate 3-story buildings. The residents share common lobbies and hallways, in addition to laundry and trash facilities.

The Lakeside Village project is subject to certain covenants, conditions and restrictions (hereafter CC&R's) that were included in the developer's declaration recorded with the Los Angeles County Recorder on April 17, 1978, at the inception of the development project. Ownership of a unit includes membership in the project's homeowners association, the Lakeside Village Condominium Association (hereafter Association), the body that enforces the project's CC&R's, including the pet restriction, which provides in relevant part: "No animals (which shall mean dogs and cats), livestock, reptiles or poultry shall be kept in any unit." 3

FOOTNOTES

3 The CC&R's permit residents to keep "domestic fish and birds."

In January 1988, plaintiff Natore Nahrstedt purchased a Lakeside Village condominium and moved in with her three cats. When the Association learned of the cats' presence, it demanded their removal and assessed fines against Nahrstedt for each successive month that she remained in violation of the condominium project's pet restriction.

Nahrstedt then brought this lawsuit against the Association, its officers, and two of its employees, 4 asking the trial court to invalidate the assessments, to enjoin future assessments, to award damages for violation of her privacy when the Association "peered" into her condominium unit, to award damages for infliction of emotional distress, and to declare the pet restriction "unreasonable" as applied to indoor cats (such as hers) that are not allowed free run of the project's common areas. Nahrstedt also alleged she did not know of the pet restriction when she bought her condominium. The complaint incorporated by reference the grant deed, the declaration of CC&R's, and the condominium plan for the Lakeside Village condominium project.

FOOTNOTES

4 Further references to the Association will pertain to these defendants collectively.

The Association demurred to the complaint. In its supporting points and authorities, the Association argued that the pet restriction furthers the collective "health, happiness and peace of mind" of persons living in close proximity within the Lakeside Village condominium development, and therefore is reasonable as a matter of law. The trial court sustained the demurrer as to each cause of action and dismissed Nahrstedt's complaint. Nahrstedt appealed.

A divided Court of Appeal reversed the trial court's judgment of dismissal. In the majority's view, the complaint stated a claim for declaratory relief based on its allegations that Nahrstedt's three cats are kept inside her condominium unit and do not bother her neighbors. According to the majority, whether a condominium use restriction is "unreasonable," as that term is used in section 1354, hinges on the facts of a particular homeowner's case. Thus, the majority reasoned, Nahrstedt would be entitled to declaratory relief if application of the pet restriction in her case would not be reasonable. The Court of Appeal also revived Nahrstedt's causes of action for invasion of privacy, invalidation of the assessments, and injunctive relief, as well as her action for emotional distress based on a theory of negligence.

The dissenting justice took the view that enforcement of the Lakeside Village pet restriction against Nahrstedt should not depend on the "reasonableness" of the restriction as applied to Nahrstedt. To evaluate on a case-by-case basis the reasonableness of a recorded use restriction included in the declaration of a condominium project, the dissent said, would be at odds with the Legislature's intent that such restrictions be regarded as presumptively reasonable and subject to enforcement under the rules governing equitable servitudes. Application of those rules, the dissenting justice concluded, would render a recorded use restriction valid unless "there are constitutional principles at stake, enforcement is arbitrary, or the association fails to follow its own procedures."

On the Association's petition, we granted review to decide when a condominium owner can prevent enforcement of a use restriction that the project's developer has included in the recorded declaration of CC&R's.

To facilitate the reader's understanding of the function served by use restrictions in condominium developments and related real property ownership arrangements, we begin with a broad overview of the general principles governing common interest forms of real property ownership.

II

Today, condominiums, cooperatives, and planned-unit developments with homeowners associations have become a widely accepted form of real property ownership. These ownership arrangements are known as "common interest" developments. (4B Powell, Real Property (1993) Condominiums, Cooperatives and Homeowners Association Developments, § 631, pp. 54-7 to 54-8; 15A Am.Jur.2d, Condominium and Co-operative Apartments, § 1, p. 827.) The owner not only enjoys many of the traditional advantages associated with individual ownership of real property, but also acquires an interest in common with others in the amenities and facilities included in the project. It is this hybrid nature of property rights that largely accounts for the popularity of these new and innovative forms of ownership in the 20th century. (4B Powell, Real Property, supra, § 631, pp. 54-7 to 54-8.)

The term "condominium," which is used to describe a system of ownership as well as an individually owned unit in a multi-unit development, is Latin in origin and means joint dominion or co-ownership. (4B Powell, Real Property, supra, § 632.1[4], p. 54-18.) The concept of shared real property ownership is said to have its roots in ancient Rome. (Ibid.; see also Ramsey,

Condominium (1963) 9 Prac. Law. 21; Note, Land Without Earth--The Condominium (1962) 15 U.Fla. L.Rev. 203, 205.) The accuracy of this view has been challenged, however. (See Natelson, Comments on the Historiography of Condominium: The Myth of Roman Origin (1987) 12 Okla. City U. L.Rev. 17; 15A Am.Jur.2d, supra, § 6, p. 834, fn. 69.) Professor Natelson points to evidence tracing the condominium concept to medieval Germanic custom. By the 12th century, the towns of Germany had embraced the notion of separate ownership of individual stories in a building. (Natelson, Law of Property Owners Associations (1989) § 1.3.2, p. 20; see also Leyser, The Ownership of Flats--A Comparative Study (1958) 7 Int'l & Comp. L.Q. 31, 33; 15A Am.Jur.2d, supra, § 6, p. 834.) "Houses were horizontally divided, and specific parts so created--the stories, floors, and cellars--were held by different persons in separate ownership; this being associated, as a rule, with the community ownership of the building site and the portions of the building (walls, stairs, roof, etc.) that were used in common." (Huebner, History of Germanic Private Law (1918) p. 174, as quoted in Note, Land Without Earth--The Condominium, supra, 15 U.Fla. L.Rev. at p. 205, fn. 14.) Development of this innovative form of ownership in Germany may have been encouraged by two factors: "a vibrant middle class made the institution possible, and the cramped nature of life behind town walls made it desirable." (Natelson, Law of Property Owners Associations, supra, § 1.3.2.2, p. 20.)

The concept of "horizontal property" or "strata" ownership simply means that the area above land can be divided into a series of strata or planes capable of severed ownership, making the ownership of things affixed to land separable from the ownership of the land itself. (Natelson, Law of Property Owners Associations, supra, § 1.3.2, pp. 24-25; Ball, Division into Horizontal Strata of the Landscape Above the Surface (1930) 39 Yale L.J. 616.) This idea, however, was inconsistent with the view expressed in many European civil codes and at English common law that the owner of the soil possessed the exclusive right to control everything on, above, or beneath the land, and that fixtures attached to land therefore could not be severed from ownership of the land. (See Schwartz, Condominium: A Hybrid Castle in the Sky (1964) 44 B.U. L.Rev. 137, 141 [noting the traditional view that "whatever is attached to the land belongs to the land" and, consequently, to the person who owns the land itself]; Note, Land Without Earth--The Condominium, supra, 15 U.Fla. L.Rev. at pp. 205-206 [noting the general hostility expressed in European civil codes to the concept of horizontal property].)

Indeed, there was no statutory authority for the severing of real property ownership by planes or floors until 1804, when the French Civil Code (the Code Napoleon) acknowledged that "the different stories of a house [could] belong to different proprietors," and that in such cases "[t]he main walls and the roof [could be] at the charge of all the proprietors, each in proportion to the story belonging to him." (Quoted in Natelson, Law of Property Owners Associations, supra, § 1.3.2, pp. 24-25.)

Not until nearly 160 years later did the notion of shared ownership of real property gain general acceptance in the United States. This occurred after Congress, through the National Housing Act of 1961, made federal mortgage insurance available to condominium units so as to encourage and facilitate home ownership. (15A Am.Jur.2d, supra, § 7, p. 835; Note, Judicial Review of Condominium Rulemaking (1981) 94 Harv.L.Rev. 647, 653, fn. 33.) Why did it take so long for this country to accept the idea of horizontal property ownership? Perhaps because the United States was, until recent times, so sparsely populated--and undeveloped habitable land and building materials so affordable--that there was "no great physical need for superimposing one dwelling upon another." (Note, Land Without Earth--The Condominium, supra, 15 U.Fla. L.Rev. at p. 206; see also Leyser, The Ownership of Flats--A Comparative Study, supra, 7 Int'l & Comp. L.Q. at p. 31, fn. 3 [noting the similarly late development of shared ownership housing arrangements in another large, sparsely populated country--Australia].)

To divide a plot of land into interests severable by blocks or planes, the attorney for the land developer must prepare a declaration that must be recorded prior to the sale of any unit in the

county where the land is located. (Natelson, Consent, Coercion, and "Reasonableness" IN PRIVATE LAW: The Special Case of the Property Owners Association (1990) 51 Ohio State L.J. 41, 47 [hereafter Natelson, Consent, Coercion, and "Reasonableness"].) The declaration, which is the operative document for the creation of any common interest development, is a collection of covenants, conditions and servitudes that govern the project. (Ibid.; see also 4B Powell, Real Property, supra, § 632.4[1] & [2], pp. 54-84, 54-92; 15A Am.Jur.2d, supra, § 14, p. 843.) Typically, the declaration describes the real property and any structures on the property, delineates the common areas within the project as well as the individually held lots or units, and sets forth restrictions pertaining to the use of the property. (15A Am.Jur.2d, supra, § 14, p. 843.)

Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement. (Note, Community Association Use Restrictions: Applying the Business Judgment Doctrine (1988) 64 Chi.-Kent L.Rev. 653, 673 [hereafter Note, Business Judgment]; see also Natelson, Consent, Coercion and "Reasonableness," supra, 51 Ohio State L.J. at p. 47.) The viability of shared ownership of improved real property rests on the existence of extensive reciprocal servitudes, together with the ability of each co-owner to prevent the property's partition. (Natelson, Law of Property Owners Associations, supra, § 1.3.2.1, p. 19; see also Note, Business Judgment, supra, 64 Chi.-Kent L.Rev. at p. 673 [suggesting that medieval building societies, an early form of shared real property ownership, had failed for lack of enforceable regulations].)

The restrictions on the use of property in any common interest development may limit activities conducted in the common areas as well as in the confines of the home itself. (Reichman, Residential Private Governments (1976) 43 U.Chi. L.Rev. 253, 270; 15A Am.Jur.2d, supra, § 16, pp. 845-846.) Commonly, use restrictions preclude alteration of building exteriors, limit the number of persons that can occupy each unit, and place limitations on--or prohibit altogether--the keeping of pets. (4B Powell, Real Property, supra, § 632.5[11], p. 54-221; Reichman, Residential Private Governments, supra, at p. 270; Natelson, Consent, Coercion, and "Reasonableness," supra, 51 Ohio St. L.J. at p. 48, fn. 28 [as of 1986, 58 percent of highrise developments and 39 percent of townhouse projects had some kind of pet restriction]; see also Noble v. Murphy (1993) 34 Mass.App. 452 [612 N.E.2d 266] [enforcing condominium ban on pets]; Dulaney Towers Maintenance Corp. v. O'Brey, supra, 418 A.2d 1233 [upholding pet restriction]; Wilshire Condominium Ass'n, Inc. v. Kohlbrand (Fla.Dist.Ct.App. 1979) 368 So.2d 629 [same].) 5

FOOTNOTES

5 Even the dissent recognizes that pet restrictions have a long pedigree. (See dis. opn., post, p. 392, fn. 5, citing Crimmins, The Quotable Cat (1992) p. 58 [English nuns living in a nunnery prohibited in 1205 from keeping any pet except a cat].)

Restrictions on property use are not the only characteristic of common interest ownership. Ordinarily, such ownership also entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project. (Cal. Condominium and Planned Development Practice (Cont.Ed.Bar 1984) § 1.7, p. 13; Note, Business Judgment, supra, 64 Chi.-Kent L.Rev. at p. 653; Natelson, Law of Property Owners Associations, supra, § 3.2.2, p. 71 et seq.) Because of its considerable power in managing and regulating a common interest development, the governing board of an owners association must guard against the potential for the abuse of that power. 6 As Professor Natelson observes, owners associations "can be a powerful force for good or for ill" in their members' lives. (Natelson, Consent, Coercion, and "Reasonableness," supra, 51 Ohio St. L.J. at p. 43.) Therefore, anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts "the risk that the power may be used in a way that benefits the commonality but harms the individual." (Id. at p. 67.) Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent

good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy. (*Id.* at p. 43.)

FOOTNOTES

6 The power to regulate pertains to a "wide spectrum of activities," such as the volume of playing music, hours of social gatherings, use of patio furniture and barbecues, and rental of units. (Note, *Business Judgment*, *supra*, 64 *Chi.-Kent L.Rev.* at p. 669.)

Thus, subordination of individual property rights to the collective judgment of the owners association together with restrictions on the use of real property comprise the chief attributes of owning property in a common interest development. As the Florida District Court of Appeal observed in *Hidden Harbour Estates, Inc. v. Norman* (Fla.Dist.Ct.App. 1975) 309 So.2d 180 [72 A.L.R.3d 305], a decision frequently cited in condominium cases: "[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he [or she] might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic subsociety of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization." (*Id.* at pp. 181-182; see also *Leyser, The Ownership of Flats--A Comparative Study*, *supra*, 7 *Int'l & Comp. L.Q.* at p. 38 [explaining the French system's recognition that "flat ownership" has limitations that considerably exceed those of "normal" real property ownership, "limitations arising out of the rights of the other flat owners."].)

Notwithstanding the limitations on personal autonomy that are inherent in the concept of shared ownership of residential property, common interest developments have increased in popularity in recent years, in part because they generally provide a more affordable alternative to ownership of a single-family home. (See *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 500, fn. 9 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447] [noting that common interest developments at that time accounted for as much as 70 percent of the new housing market in Los Angeles and San Diego Counties]; *Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 681 [174 Cal.Rptr. 136]; *Natelson, Consent, Coercion and "Reasonableness," supra*, 51 *Ohio St. L.J.* at pp. 42-43 [as of 1988, more than 30 million Americans lived in housing governed by owners associations]; see also *McKenzie, Welcome Home. Do as We Say.*, *N.Y. Times* (Aug. 18, 1994) p. 23A, col. 1 [stating that 32 million Americans are members of some 150,000 homeowners associations and predicting that between 25 to 30 percent of Americans will live in community association housing by the year 2000.]

One significant factor in the continued popularity of the common interest form of property ownership is the ability of homeowners to enforce restrictive CC&R's against other owners (including future purchasers) of project units. (*Natelson, Law of Property Owners Associations, supra*, § 1.3.2.1, p. 19; Note, *Business Judgment, supra*, 64 *Chi.-Kent L.Rev.* at p. 673.) Generally, however, such enforcement is possible only if the restriction that is sought to be enforced meets the requirements of equitable servitudes or of covenants running with the land. (*Cal. Condominium and Planned Development Practice, supra*, § 8.42-8.44, pp. 666-668; Note, *Covenants and Equitable Servitudes in California* (1978) 29 *Hastings L.J.* 545, 553-573.)

Restrictive covenants will run with the land, and thus bind successive owners, if the deed or other instrument containing the restrictive covenant particularly describes the lands to be benefited and burdened by the restriction and expressly provides that successors in interest of the covenantor's land will be bound for the benefit of the covenantee's land. Moreover, restrictions must relate to use, repair, maintenance, or improvement of the property, or to payment of taxes or assessments, and the instrument containing the restrictions must be recorded. (See § 1468; *Advising Cal. Condominium and Homeowners Associations* (Cont.Ed.Bar 1991) § 7.33, p. 342.)

Restrictions that do not meet the requirements of covenants running with the land may be enforceable as equitable servitudes provided the person bound by the restrictions had notice of their existence. (*Riley v. Bear Creek Planning Committee* (1976) 17 Cal.3d 500, 507 [131 Cal.Rptr. 381, 551 P.2d 1213]; *Cal. Condominium and Planned Development Practice*, supra, § 8.44, pp. 667-668.)

When restrictions limiting the use of property within a common interest development satisfy the requirements of covenants running with the land or of equitable servitudes, what standard or test governs their enforceability? In California, as we explained at the outset, our Legislature has made common interest development use restrictions contained in a project's recorded declaration "enforceable ... unless unreasonable." (§ 1354, subd. (a), italics added.)

In states lacking such legislative guidance, some courts have adopted a standard under which a common interest development's recorded use restrictions will be enforced so long as they are "reasonable." (See *Riley v. Stoves* (1974) 22 Ariz.App. 223 [526 P.2d 747, 752, 68 A.L.R.3d 1229] [asking whether the challenged restriction provided "a reasonable means to accomplish the private objective"]; *Hidden Harbour Estates, Inc. v. Norman*, supra, 309 So.2d at p. 182 [to justify regulation, conduct need not be "so offensive as to constitute a nuisance"]; 15A Am.Jur.2d, supra, § 31, p. 861.) Although no one definition of the term "reasonable" has gained universal acceptance, most courts have applied what one commentator calls "equitable reasonableness," upholding only those restrictions that provide a reasonable means to further the collective "health, happiness and enjoyment of life" of owners of a common interest development. (Note, *Business Judgment*, supra, 64 Chi.-Kent L.Rev. at p. 655.) Others would limit the "reasonableness" standard only to those restrictions adopted by majority vote of the homeowners or enacted under the rulemaking power of an association's governing board, and would not apply this test to restrictions included in a planned development project's recorded declaration or master deed. Because such restrictions are presumptively valid, these authorities would enforce them regardless of reasonableness. The first court to articulate this view was the Florida Fourth District Court of Appeal.

In *Hidden Harbour Estates v. Basso* (Fla.Dist.Ct.App. 1981) 393 So.2d 637, the Florida court distinguished two categories of use restrictions: use restrictions set forth in the declaration or master deed of the condominium project itself, and rules promulgated by the governing board of the condominium owners association or the board's interpretation of a rule. (*Id.* at p. 639.) The latter category of use restrictions, the court said, should be subject to a "reasonableness" test, so as to "somewhat fetter the discretion of the board of directors." (*Id.* at p. 640.) Such a standard, the court explained, best assures that governing boards will "enact rules and make decisions that are reasonably related to the promotion of the health, happiness and peace of mind" of the project owners, considered collectively. (*Ibid.*)

By contrast, restrictions contained in the declaration or master deed of the condominium complex, the Florida court concluded, should not be evaluated under a "reasonableness" standard. (*Hidden Harbour Estates v. Basso*, supra, 393 So.2d at pp. 639-640.) Rather, such use restrictions are "clothed with a very strong presumption of validity" and should be upheld even if they exhibit some degree of unreasonableness. (*Id.* at pp. 639, 640.) Nonenforcement would be proper only if such restrictions were arbitrary or in violation of public policy or some fundamental constitutional right. (*Id.* at pp. 639-640.) The Florida court's decision was cited with approval recently by a Massachusetts appellate court in *Noble v. Murphy*, supra, 612 N.E.2d 266.

In *Noble*, managers of a condominium development sought to enforce against the owners of one unit a pet restriction contained in the project's master deed. The Massachusetts court upheld the validity of the restriction. The court stated that "[a] condominium use restriction appearing in originating documents which predate the purchase of individual units" was entitled to greater judicial deference than restrictions "promulgated after units have been individually acquired." (

Noble v. Murphy, supra, 612 N.E.2d at p. 270.) The court reasoned that "properly-enacted and evenly-enforced use restrictions contained in a master deed or original bylaws of a condominium" should be insulated against attack "except on constitutional or public policy grounds." (Id. at p. 271.) This standard, the court explained, best "serves the interest of the majority of owners [within a project] who may be presumed to have chosen not to alter or rescind such restrictions," and it spares overcrowded courts "the burden and expense of highly particularized and lengthy litigation." (Ibid.)

Indeed, giving deference to use restrictions contained in a condominium project's originating documents protects the general expectations of condominium owners "that restrictions in place at the time they purchase their units will be enforceable." (Note, Judicial Review of Condominium Rulemaking, supra, 94 Harv.L.Rev. 647, 653; Ellickson, Cities and Homeowners' Associations (1982) 130 U.Pa. L.Rev. 1519, 1526-1527 [stating that association members "unanimously consent to the provisions in the association's original documents" and courts therefore should not scrutinize such documents for "reasonableness."].) This in turn encourages the development of shared ownership housing--generally a less costly alternative to single-dwelling ownership--by attracting buyers who prefer a stable, planned environment. It also protects buyers who have paid a premium for condominium units in reliance on a particular restrictive scheme.

To what extent are these general principles reflected in California's statutory scheme governing condominiums and other common interest developments? We shall explore that in the next section.

III

In California, common interest developments are subject to the provisions of the Davis-Stirling Common Interest Development Act (hereafter Davis-Stirling Act or Act). (§ 1350 et seq.) The Act, passed into law in 1985, consolidated in one part of the Civil Code certain definitions and other substantive provisions pertaining to condominiums and other types of common interest developments. (Stats. 1985, ch. 874, § 14, p. 2774.)

The Act enumerates the specific shared ownership arrangements that fall under the rubric "common interest development." (§ 1351, subd. (c)(1)-(4).) 7 It also sets out the requirements for establishing a common interest development (§ 1352), reserves to each homeowner in such a development limited authority to modify an individual unit (§ 1360), grants to the owners association of the development those powers necessary to the development's long-term operation (§ 1363, 1364, 1365.5, 1366), and recognizes the right of homeowners collectively to alter or amend existing use restrictions, or to add new ones (§ 1356).

FOOTNOTES

7 These are: community apartment projects, condominium projects, planned developments, and stock cooperatives.

Section 1352 states that "whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been here, conveyed" and a declaration, a condominium plan, and (when necessary) a subdivision map plan recorded, "[t]his title applies and a common interest development is created." (Italics added.) 8 Declarations recorded after January 1, 1986, the effective date of the Act, must include a legal description of the common interest development, a statement of the type of development (condominium project, stock cooperative, etc.), the name of the association charged with operating the development, and "the restrictions on the use or enjoyment of any portion of the common interest development." (§ 1353.)

FOOTNOTES

8 Thus, the Act governs common interest developments that predate its enactment.

Pertinent here is the Act's provision for the enforcement of use restrictions contained in the project's recorded declaration. That provision, subdivision (a) of section 1354, states in relevant part: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development." (*Italics added.*)⁹ To determine when a restrictive covenant included in the declaration of a common interest development cannot be enforced, we must construe section 1354. In doing so, our primary task is to ascertain legislative intent, giving the words of the statute their ordinary meaning. (*People v. Broussard* (1993) 5 Cal.4th 1067, 1071 [22 Cal.Rptr.2d 278, 856 P.2d 1134]; *Woods v. Young* (1991) 53 Cal.3d 315, 323 [279 Cal.Rptr. 613, 807 P.2d 455].) The words, however, must be read in context, considering the nature and purpose of the statutory enactment. (*Woods v. Young*, *supra*, at p. 323; *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836].)

FOOTNOTES

⁹ Section 1354 also confers standing on owners of separate interests in a development and on the association to enforce the equitable servitudes, and it sets out requirements for commencing a civil action.

As we have mentioned in the preceding paragraph, section 1354 states that covenants and restrictions appearing in the recorded declaration of a common interest development are "enforceable equitable servitudes, unless unreasonable." The provision's express reference to "equitable servitudes" evidences the Legislature's intent that recorded use restrictions falling within section 1354 are to be treated as equitable servitudes. (See *Cal. Condominium and Planned Development Practice*, *supra*, § 8.40, p. 666 [giving this interpretation to former § 1355].) ¹⁰ Thus, although under general rules governing equitable servitudes a subsequent purchaser of land subject to restrictions must have actual notice of the restrictions, actual notice is not required to enforce recorded use restrictions covered by section 1354 against a subsequent purchaser. Rather, the inclusion of covenants and restrictions in the declaration recorded with the county recorder provides sufficient notice to permit the enforcement of such recorded covenants and restrictions as equitable servitudes. (See *Seaton v. Clifford* (1972) 24 Cal.App.3d 46, 50 [100 Cal.Rptr. 779] [recorded document of restrictions gives adequate notice to future grantees].)

FOOTNOTES

¹⁰ Before the enactment of section 1354 as part of the Davis-Stirling Act, a similar provision pertaining only to condominium units appeared in former section 1355. As relevant here, that statute provided: "The owner of a project shall, prior to the conveyance of any condominium therein, record a declaration of restrictions relating to such project, which restrictions shall be enforceable equitable servitudes where reasonable, and shall inure to and bind all owners of condominiums in the project." (Stats. 1963, ch. 860, § 3, p. 2092.)

Under the law of equitable servitudes, courts may enforce a promise about the use of land even though the person who made the promise has transferred the land to another. (See *Marra v. Aetna Construction Co.* (1940) 15 Cal.2d 375, 378 [101 P.2d 490].) The underlying idea is that a landowner's promise to refrain from particular conduct pertaining to land creates in the beneficiary of that promise "an equitable interest in the land of the promisor." (*Rest., Property*, § 539, com. a, p. 3227; 2 *Pomeroy, Equity Jurisprudence* (2d ed. 1886) § 689, quoted in *Hunt v. Jones* (1906) 149 Cal. 297, 301 [86 P. 686] [a grantee or purchaser with notice that premises are bound by a covenant "will be restrained from violating it."].) The doctrine is useful chiefly to enforce uniform building restrictions under a general plan for an entire tract of land or for a subdivision. (*Marra v. Aetna Construction Co.*, *supra*, at p. 378.) "It is undoubted that when the owner of a subdivided tract conveys the various parcels in the tract by deeds containing appropriate language imposing restrictions on each parcel as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are

thereby created in favor of each parcel as against all the others." (*Werner v. Graham* (1919) 181 Cal. 174, 183 [183 P. 945].)

In choosing equitable servitude law as the standard for enforcing CC&R's in common interest developments, the Legislature has manifested a preference in favor of their enforcement. This preference is underscored by the use of the word "shall" IN THE FIRST PHRASE OF SECTION 1354: "The covenants and restrictions shall be enforceable equitable servitudes" (See *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443 [261 Cal.Rptr. 574, 777 P.2d 610]; *Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 743 [250 Cal.Rptr. 869, 759 P.2d 504] ["shall" is ordinarily mandatory].)

The Legislature did, however, set a condition for the mandatory enforcement of a declaration's CC&R's: a covenant, condition or restriction is "enforceable ... unless unreasonable." (§ 1354, subd. (a), italics added.) The Legislature's use of the phrase "unless unreasonable" in section 1354 was a marked change from the prior version of that statutory provision, which stated that "restrictions shall be enforceable equitable servitudes where reasonable." (Former § 1355, italics added; see fn. 10, ante.) Under settled principles of statutory construction, such a material alteration of a statute's phrasing signals the Legislature's intent to give an enactment a new meaning. (*McDonough Power Equipment Co. v. Superior Court* (1972) 8 Cal.3d 527, 534, fn. 5 [105 Cal.Rptr. 330, 503 P.2d 1338].) Here, the change in statutory language, from "where reasonable" to "unless unreasonable," cloaked use restrictions contained in a condominium development's recorded declaration with a presumption of reasonableness by shifting the burden of proving otherwise to the party challenging the use restriction. (Cal. Condominium and Planned Development Practice, supra, § 1.9, p. 18 [stating that the change in statutory language "switches the burden to the person challenging the restriction to establish that it is unreasonable"]; *Advising Cal. Condominium and Homeowners Associations*, supra, § 7.34, p. 344 [same].)

How is that burden satisfied? To answer this question, we must examine the principles governing enforcement of equitable servitudes.

As noted earlier, equitable servitudes permit courts to enforce promises restricting land use when there is no privity of contract between the party seeking to enforce the promise and the party resisting enforcement. Like any promise given in exchange for consideration, an agreement to refrain from a particular use of land is subject to contract principles, under which courts try "to effectuate the legitimate desires of the covenanting parties." (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 444-445 [211 P.2d 302, 19 A.L.R.2d 1268].) When landowners express the intention to limit land use, "that intention should be carried out." (*Id.* at p. 444; Epstein, *Notice and Freedom of Contract in the Law of Servitudes* (1982) 55 So. Cal. L. Rev. 1353, 1359 ["We may not understand why property owners want certain obligations to run with the land, but as it is their land ... some very strong reason should be advanced" before courts should override those obligations. (Original italics.)].)

Thus, when enforcing equitable servitudes, courts are generally disinclined to question the wisdom of agreed-to restrictions. (Note, *Covenants and Equitable Servitudes in California*, supra, 29 *Hastings L.J.* at p. 577, citing *Walker v. Haslett* (1919) 44 Cal.App. 394, 397-398 [186 P. 622].) This rule does not apply, however, when the restriction does not comport with public policy. (*Ibid.*) Equity will not enforce any restrictive covenant that violates public policy. (See *Shelley v. Kraemer* (1948) 334 U.S. 1 [92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441] [racial restriction unenforceable]; § 53, subd. (b) [voiding property use restrictions based on "sex, race, color, religion, ancestry, national origin, or disability"].) Nor will courts enforce as equitable servitudes those restrictions that are arbitrary, that is, bearing no rational relationship to the protection, preservation, operation or purpose of the affected land. (See *Laguna Royale Owners Assn. v. Darger*, supra, 119 Cal.App.3d 670, 684.)

These limitations on the equitable enforcement of restrictive servitudes that are either arbitrary or violate fundamental public policy are specific applications of the general rule that courts will not enforce a restrictive covenant when "the harm caused by the restriction is so disproportionate to the benefit produced" by its enforcement that the restriction "ought not to be enforced." (Rest., Property, § 539, com. f, pp. 3229-3230; see also 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 494, pp. 671-672; Note, Covenants and Equitable Servitudes in California, supra, 29 Hastings L.J. at pp. 575-576.) When a use restriction bears no relationship to the land it burdens, or violates a fundamental policy inuring to the public at large, the resulting harm will always be disproportionate to any benefit.

Sometimes lesser burdens too can be so disproportionate to any benefit flowing from the restriction that the restriction "ought not to be enforced." (Rest., Property, § 539, com. f, p. 3230.) For instance, courts will not enforce a land use restriction when a change in surrounding properties effectively defeats the intended purpose of the restriction, rendering it of little benefit to the remaining property owners. (*Lincoln Sav. & Loan Assn. v. Riviera Estates Assn.* (1970) 7 Cal.App.3d 449, 460 [87 Cal.Rptr. 150].) In such cases, enforcing the restriction would be oppressive or inequitable. (*Atlas Terminals, Inc. v. Sokol* (1962) 203 Cal.App.2d 191, 195 [21 Cal.Rptr. 293]; see generally, 7 Miller & Starr, California Real Estate (1990) Covenants and Restrictions, § 22:19, p. 575; Note, Restrictive Covenants: Injunctions: Changed Conditions in the Neighborhood as a Bar to Enforcement of Equitable Servitudes (1927) 16 Cal.L.Rev. 58.)

As the first Restatement of Property points out, the test for determining when the harmful effects of a land-use restriction are so disproportionate to its benefit "is necessarily vague." (Rest., Property, § 539, com. f, p. 3230.) Application of the test requires the accommodation of two policies that sometimes conflict: "One of these is that [persons] should be required to live up to their promises; the other that land should be developed to its normal capacity." (Ibid.) Reconciliation of these policies in determining whether the burdens of a recorded use restriction are so disproportionate to its benefits depends on the effect of the challenged restriction on "promoting or limiting the use of land in the locality" (Ibid.)

From the authorities discussed above, we distill these principles: An equitable servitude will be enforced unless it violates public policy; it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced.

With these principles of equitable servitude law to guide us, we now turn to section 1354. As mentioned earlier, under subdivision (a) of section 1354 the use restrictions for a common interest development that are set forth in the recorded declaration are "enforceable equitable servitudes, unless unreasonable." In other words, such restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit.

This interpretation of section 1354 is consistent with the views of legal commentators as well as judicial decisions in other jurisdictions that have applied a presumption of validity to the recorded land use restrictions of a common interest development. (*Noble v. Murphy*, supra, 612 N.E.2d 266, 270; *Hidden Harbour Estates v. Basso*, supra, 393 So.2d 637, 639-640; Note, Judicial Review of Condominium Rulemaking, supra, 94 Harv.L.Rev. 647, 653.) As these authorities point out, and as we discussed previously, recorded CC&R's are the primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development. In general, then, enforcement of a common interest development's recorded CC&R's will both encourage the development of land and ensure that promises are kept, thereby fulfilling both of the policies identified by the Restatement. (See Rest., Property, § 539, com. f, p. 3230.)

When courts accord a presumption of validity to all such recorded use restrictions and measure them against deferential standards of equitable servitude law, it discourages lawsuits by owners of individual units seeking personal exemptions from the restrictions. This also promotes stability and predictability in two ways. It provides substantial assurance to prospective condominium purchasers that they may rely with confidence on the promises embodied in the project's recorded CC&R's. And it protects all owners in the planned development from unanticipated increases in association fees to fund the defense of legal challenges to recorded restrictions.

How courts enforce recorded use restrictions affects not only those who have made their homes in planned developments, but also the owners associations charged with the fiduciary obligation to enforce those restrictions. (See *Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1247 [280 Cal.Rptr. 568]; *Advising Cal. Condominium and Homeowner Associations*, supra, § 6.11, pp. 259-261.) When courts treat recorded use restrictions as presumptively valid, and place on the challenger the burden of proving the restriction "unreasonable" under the deferential standards applicable to equitable servitudes, associations can proceed to enforce reasonable restrictive covenants without fear that their actions will embroil them in costly and prolonged legal proceedings. Of course, when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly. (See *Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772 [224 Cal.Rptr. 18]; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650 [191 Cal.Rptr. 209].)

There is an additional beneficiary of legal rules that are protective of recorded use restrictions: the judicial system. Fewer lawsuits challenging such restrictions will be brought, and those that are filed may be disposed of more expeditiously, if the rules courts use in evaluating such restrictions are clear, simple, and not subject to exceptions based on the peculiar circumstances or hardships of individual residents in condominiums and other shared-ownership developments.

Contrary to the dissent's accusations that the majority's decision "fray[s]" the "social fabric" (dis. opn., post, p. 390), we are of the view that our social fabric is best preserved if courts uphold and enforce solemn written instruments that embody the expectations of the parties rather than treat them as "worthless paper" as the dissent would (dis. opn., post, p. 396). Our social fabric is founded on the stability of expectation and obligation that arises from the consistent enforcement of the terms of deeds, contracts, wills, statutes, and other writings. To allow one person to escape obligations under a written instrument upsets the expectations of all the other parties governed by that instrument (here, the owners of the other 529 units) that the instrument will be uniformly and predictably enforced.

The salutary effect of enforcing written instruments and the statutes that apply to them is particularly true in the case of the declaration of a common interest development. As we have discussed, common interest developments are a more intensive and efficient form of land use that greatly benefits society and expands opportunities for home ownership. In turn, however, a common interest development creates a community of property owners living in close proximity to each other, typically much closer than if each owned his or her separate plot of land. This proximity is feasible, and units in a common interest development are marketable, largely because the recorded declaration of CC&R's assures owners of a stable and predictable environment.

Refusing to enforce the CC&R's contained in a recorded declaration, or enforcing them only after protracted litigation that would require justification of their application on a case-by-case basis, would impose great strain on the social fabric of the common interest development. It would frustrate owners who had purchased their units in reliance on the CC&R's. It would put the owners and the homeowners association in the difficult and divisive position of deciding whether particular CC&R's should be applied to a particular owner. Here, for example, deciding whether a particular animal is "confined to an owner's unit and create[s] no noise, odor, or nuisance" (dis.

opn., post, p. 394) is a fact-intensive determination that can only be made by examining in detail the behavior of the particular animal and the behavior of the particular owner. Homeowners associations are ill-equipped to make such investigations, and any decision they might make in a particular case could be divisive or subject to claims of partiality.

Enforcing the CC&R's contained in a recorded declaration only after protracted case-by-case litigation would impose substantial litigation costs on the owners through their homeowners association, which would have to defend not only against owners contesting the application of the CC&R's to them, but also against owners contesting any case-by-case exceptions the homeowners association might make. In short, it is difficult to imagine what could more disrupt the harmony of a common interest development than the course proposed by the dissent.

IV

Here, the Court of Appeal failed to consider the rules governing equitable servitudes in holding that Nahrstedt's complaint challenging the Lakeside Village restriction against the keeping of cats in condominium units stated a cause of action for declaratory relief. Instead, the court concluded that factual allegations by Nahrstedt that her cats are kept inside her condominium unit and do not bother her neighbors were sufficient to have the trial court decide whether enforcement of the restriction against Nahrstedt would be reasonable. For this conclusion, the court relied on two Court of Appeal decisions, *Bernardo Villas Management Corp. v. Black* (1987) 190 Cal.App.3d 153 [235 Cal.Rptr. 509] and *Portola Hills Community Assn. v. James* (1992) 4 Cal.App.4th 289 [5 Cal.Rptr.2d 580], both of which had invalidated recorded restrictions covered by section 1354.

In *Bernardo Villas*, the manager of a condominium project sued two condominium residents to enforce a restriction that prohibited them from keeping any "truck, camper, trailer, boat ... or other form of recreational vehicle" in the carports. (190 Cal.App.3d at p. 154.) In holding that the restriction was unreasonable as applied to the clean new pickup truck with camper shell that the defendants used for personal transportation, the Court of Appeal observed that parking the truck in the development's carport would "not interfere with other owners' use or enjoyment of their property." (Id. at p. 155.)

Thereafter, a different division of the same district Court of Appeal used a similar analysis in *Portola Hills*. There, the court refused to enforce a planned community's landscape restriction banning satellite dishes against a homeowner who had installed a satellite dish in his backyard. After expressing the view that "[a] homeowner is allowed to prove a particular restriction is unreasonable as applied to his property," the court observed that the defendant's satellite dish was not visible to other project residents or the public, leading the court to conclude that the ban promoted no legitimate goal of the homeowners association. (4 Cal.App.4th at p. 293.)

At issue in both *Bernardo Villas Management Corp. v. Black*, supra, 190 Cal.App.3d 153, and *Portola Hills Community Assn. v. James*, supra, 4 Cal.App.4th 289, were recorded use restrictions contained in a common interest development's declaration that had been recorded with the county recorder. Accordingly, the use restrictions involved in these two cases were covered by section 1354, rendering them presumptively reasonable and enforceable under the rules governing equitable servitudes. As we have explained, courts will enforce an equitable servitude unless it violates a fundamental public policy, it bears no rational relationship to the protection, preservation, operation or purpose of the affected land, or its harmful effects on land use are otherwise so disproportionate to its benefits to affected homeowners that it should not be enforced. In determining whether a restriction is "unreasonable" under section 1354, and thus not enforceable, the focus is on the restriction's effect on the project as a whole, not on the individual homeowner. Although purporting to evaluate the use restrictions in accord with section 1354, both *Bernardo Villas* and *Portola Hills* failed to apply the deferential standards of equitable servitude law just mentioned. Accordingly, to the extent they differ from the views expressed in this opinion, we disapprove *Bernardo Villas* and *Portola Hills*.

Under the holding we adopt today, the reasonableness or unreasonableness of a condominium use restriction that the Legislature has made subject to section 1354 is to be determined not by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole. As we have explained, when, as here, a restriction is contained in the declaration of the common interest development and is recorded with the county recorder, the restriction is presumed to be reasonable and will be enforced uniformly against all residents of the common interest development unless the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction's benefits to the development's residents, or violates a fundamental public policy.

Accordingly, here Nahrstedt could prevent enforcement of the Lakeside Village pet restriction by proving that the restriction is arbitrary, that it is substantially more burdensome than beneficial to the affected properties, or that it violates a fundamental public policy. For the reasons set forth below, Nahrstedt's complaint fails to adequately allege any of these three grounds of unreasonableness.

We conclude, as a matter of law, that the recorded pet restriction of the Lakeside Village condominium development prohibiting cats or dogs but allowing some other pets is not arbitrary, but is rationally related to health, sanitation and noise concerns legitimately held by residents of a high-density condominium project such as Lakeside Village, which includes 530 units in 12 separate 3-story buildings.

Nahrstedt's complaint alleges no facts that could possibly support a finding that the burden of the restriction on the affected property is so disproportionate to its benefit that the restriction is unreasonable and should not be enforced. Also, the complaint's allegations center on Nahrstedt and her cats (that she keeps them inside her condominium unit and that they do not bother her neighbors), without any reference to the effect on the condominium development as a whole, thus rendering the allegations legally insufficient to overcome section 1354's presumption of the restriction's validity.

Nahrstedt's complaint does contend that the restriction violates her right to privacy under the California Constitution, article I, section 1. 11 According to Nahrstedt, this state constitutional provision (enacted by voter initiative in 1972) guarantees her the right to keep cats in her Lakeside Village condominium notwithstanding the existence of a restriction in the development's originating documents recorded with the county recorder specifically disallowing cats or dogs in the condominium project. Because a land-use restriction in violation of a state constitutional provision presumably would conflict with public policy (see *Gantt v. Sentry* (1992) 1 Cal.4th 1083, 1094-1095 [4 Cal.Rptr.2d 874, 824 P.2d 680]), we construe Nahrstedt's contention as a claim that the Lakeside Village pet restriction violates a fundamental public policy and for that reason cannot be enforced. As we have pointed out earlier, courts will not enforce a land use restriction that violates a fundamental public policy. The pertinent question, therefore, is whether the privacy provision in our state Constitution implicitly guarantees condominium owners or residents the right to keep cats or dogs as household pets. We conclude that California's Constitution confers no such right.

FOOTNOTES

11 That provision states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Italics added.)

We recently held, in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 [26 Cal.Rptr.2d 834, 865 P.2d 633] that the privacy provision in our state Constitution does not "encompass all

conceivable assertions of individual rights" or create "an unbridled right" of personal freedom. (*Id.* at pp. 35-36.) The legally recognized privacy interests that fall within the protection of the state Constitution are generally of two classes: (1) interests in precluding dissemination of confidential information (" 'informational privacy' "); and (2) interests in making personal decisions or in conducting personal activities free of interference, observation, or intrusion (" 'autonomy privacy' "). (*Id.* at p. 35.) The threshold question in deciding whether "established social norms safeguard a particular type of information or protect a personal decision from public or private intervention," we explained in *Hill*, must be determined from "the usual sources of positive law governing the right to privacy--common law development, constitutional development, statutory enactment, and the ballots arguments accompanying the Privacy Initiative." (*Id.* at p. 36.)

From these sources we discern no fundamental public policy that would favor the keeping of pets in a condominium project. There is no federal or state constitutional provision or any California statute that confers a general right to keep household pets in condominiums or other common interest developments. 12 There is nothing in the ballot arguments relating to the privacy provision in our state Constitution that would be of help to plaintiff's argument in this case. The ballot arguments focused on the conduct of government and business in " 'collecting and stockpiling unnecessary information ... and misusing information gathered for one purpose in order to serve other purposes or to embarrass' " (*Hill v. National Collegiate Athletic Assn.*, supra, 7 Cal.4th at p. 21, quoting from the ballot arguments for initiative adopted by voters on Nov. 7, 1972 [Privacy Initiative]), and therefore lend no support to Nahrstedt. Nor does case law offer any support for the position that the recognized scope of autonomy privacy encompasses the right to keep pets: courts that have considered condominium pet restrictions have uniformly upheld them. (*Noble v. Murphy*, supra, 612 N.E.2d 266 [upholding total ban on pets]; *Wilshire Condominium Ass'n, Inc. v. Kohlbrand*, supra, 368 So.2d 629 [upholding pet restriction]; *Dulaney Towers Maintenance v. O'Brey*, supra, 418 A.2d 1233 [same].)

FOOTNOTES

12 With respect to either disabled individuals living in rented housing or elderly persons living in publicly funded housing, the situation is otherwise. The Legislature has declared its intent that, in specified circumstances, these two classes of Californians be allowed to keep pets. Thus, section 54.1, which guarantees equal access to housing accommodations to individuals with disabilities, permits landlords to refuse to rent to tenants who have dogs, except when the prospective tenant is a disabled person needing the services of a guide, service, or signal dog. (*Id.* at subd. (b)(5).) And, under Health and Safety Code section 19901, elderly residents in publicly funded housing are entitled to have up to two household pets.

Because this case does not involve a disabled person needing guide dog assistance or an elderly person living in public housing, we do not address the public policy implications of recorded CC&R's that are in conflict with these statutes.

Our conclusion that Nahrstedt's complaint states no claim entitling her to declaratory relief disposes of her primary cause of action challenging enforcement of the Lakeside Village condominium project's pet restriction, but does not address other causes of action (for invasion of privacy, invalidation of assessments, injunctive relief, and seeking damages for emotional distress) revived by the Court of Appeal. Because the Court of Appeal's decision regarding those other causes of action may have been influenced by its conclusion that Nahrstedt had stated a claim for declaratory relief, we remand this case to the Court of Appeal so it can reconsider whether Nahrstedt's complaint is sufficient to state those other causes of action.

Conclusion

In section 1354, the Legislature has specifically addressed the subject of the enforcement of use restrictions that, like the one in this case prohibiting the keeping of certain animals, are recorded in the declaration of a condominium or other common interest development. The Legislature has

mandated judicial enforcement of those restrictions unless they are shown to be unreasonable when applied to the development as a whole.

Section 1354 requires courts determining the validity of a condominium use restriction in a recorded declaration to apply the deferential standards of equitable servitude law. These standards grant courts no unbridled license to question the wisdom of the restriction. Rather, courts must enforce the restriction unless the challenger can show that the restriction is unreasonable because it is arbitrary, violates a fundamental public policy, or imposes burdens on the use of the affected property that substantially outweigh the restriction's benefits.

By providing condominium homeowners with substantial assurance that their development's recorded use restrictions can be enforced, section 1354 promotes the stability and predictability so essential to the success of any common interest development. Persons who purchase homes in such a development typically submit to a variety of restrictions on the use of their property. In exchange, they obtain the security of knowing that all other homeowners in the development will be required to abide by those same restrictions. Section 1354 also protects the general expectations of condominium homeowners that they not be burdened with the litigation expense in defending case-by-case legal challenges to presumptively valid recorded use restrictions.

In this case, the pet restriction was contained in the project's declaration or governing document, which was recorded with the county recorder before any of the 530 units was sold. For many owners, the pet restriction may have been an important inducement to purchase into the development. Because the homeowners collectively have the power to repeal the pet restriction, its continued existence reflects their desire to retain it.

Plaintiff's allegations, even if true, are insufficient to show that the pet restriction's harmful effects substantially outweigh its benefits to the condominium development as a whole, that it bears no rational relationship to the purpose or function of the development, or that it violates public policy. We reverse the judgment of the Court of Appeal, and remand for further proceedings consistent with the views expressed in this opinion.

DISSENT BY: ARABIAN, J.

DISSENT

ARABIAN, J.

Dissenting.--"There are two means of refuge from the misery of life: music and cats." 1

FOOTNOTES

1 Albert Schweitzer.

I respectfully dissent. While technical merit may commend the majority's analysis, 2 its application to the facts presented reflects a narrow, indeed chary, view of the law that eschews the human spirit in favor of arbitrary efficiency. In my view, the resolution of this case well illustrates the conventional wisdom, and fundamental truth, of the Spanish proverb, "It is better to be a mouse in a cat's mouth than a man in a lawyer's hands."

FOOTNOTES

2 The majority invest substantial interpretive significance regarding the enforceability of condominium restrictions in the replacement of "where reasonable" in Civil Code former section 1355 with "unless unreasonable" in Civil Code section 1354. (See maj. opn., ante, at p. 380.) Other than the statutory language itself, however, they cite no evidence the Legislature considered this a "material alteration" or intended a "marked change" in the statute's interpretation. Although

I fail to see other than a semantical distinction carrying little import as to legislative intent, I find the pet restriction at issue here unenforceable under either standard.

As explained below, I find the provision known as the "pet restriction" contained in the covenants, conditions, and restrictions (CC&R's) governing the Lakeside Village project patently arbitrary and unreasonable within the meaning of Civil Code section 1354. Beyond dispute, human beings have long enjoyed an abiding and cherished association with their household animals. Given the substantial benefits derived from pet ownership, the undue burden on the use of property imposed on condominium owners who can maintain pets within the confines of their units without creating a nuisance or disturbing the quiet enjoyment of others substantially outweighs whatever meager utility the restriction may serve in the abstract. It certainly does not promote "health, happiness [or] peace of mind" commensurate with its tariff on the quality of life for those who value the companionship of animals. Worse, it contributes to the fraying of our social fabric.

3

FOOTNOTES

3 The majority imply that if enough owners find the restriction too oppressive, they can act collectively to alter or rescind it. (Maj. opn., ante, at p. 389.) However, realistically speaking, implementing this alternative would only serve to exacerbate the divisiveness rampant in our society and to which the majority decision itself contributes.

1. THE PLEADINGS.

I begin my analysis with the plaintiff's pleadings, the allegations of which must be accepted as true on review of an order sustaining a demurrer. (*Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1024 [282 Cal.Rptr. 877].) Moreover, in evaluating the sufficiency of the complaint at this stage of the proceedings, a reviewing court must "look to substance, not to form" (*Menefee v. Oxnam* (1919) 42 Cal.App. 81, 96 [183 P. 379]; see, e.g., *Universal By-Product, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 151 [117 Cal.Rptr. 525]), construing the pleadings liberally, "with a view to substantial justice between the parties" (Code Civ. Proc., § 452).

In relevant part, plaintiff has alleged that she is the owner of a condominium unit located in Lakeside Village; that she has three cats which she brought with her when she moved there; that she maintains her cats entirely within the confines of her unit and has "never released [them] in any common area"; that they are "noiseless, create no nuisance, [and] have not destroyed any portion of [her] unit, or the common area"; and that they provide her companionship. She further alleges the homeowners association is seeking to enforce a recorded restriction that prohibits keeping any pets except domestic fish and birds.

The majority acknowledge that under their interpretation of Civil Code section 1354 "the test for determining when the harmful effects of a land-use restriction are disproportionate to benefit 'is necessarily vague.' [Citation.]" (Maj. opn., ante, at p. 382.) Nevertheless, in their view the foregoing allegations are deficient because they do not specifically state facts to "support a finding that the burden of the restriction on the affected property is so disproportionate to its benefit that the restriction is unreasonable and should not be enforced." (Maj. opn., ante, at pp. 386-387.) They also fail to make "any reference to the effect on the condominium development as a whole" (Maj. opn. ante, at p. 387.) This narrow assessment of plaintiff's complaint does not comport with the rule of liberal construction that should prevail on demurrer. (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245 [74 Cal.Rptr. 398, 449 P.2d 462].) When considered less grudgingly, the pleadings are sufficient to allege that the pet restriction is unreasonable as a matter of law.

Generically stated, plaintiff challenges this restriction to the extent it precludes not only her but anyone else living in Lakeside Village from enjoying the substantial pleasures of pet ownership

while affording no discernible benefit to other unit owners if the animals are maintained without any detriment to the latter's quiet enjoyment of their own space and the common areas. In essence, she avers that when pets are kept out of sight, do not make noise, do not generate odors, and do not otherwise create a nuisance, reasonable expectations as to the quality of life within the condominium project are not impaired. At the same time, taking into consideration the well-established and long-standing historical and cultural relationship between human beings and their pets and the value they impart (cf. Evid. Code, § 452, subd. (g)), enforcement of the restriction significantly and unduly burdens the use of land for those deprived of their companionship. Considered from this perspective, I find plaintiff's complaint states a cause of action for declaratory relief. 4

FOOTNOTES

4 At the very least, plaintiff should be permitted to amend her pleadings. Under the judicial authority prevailing at the time she filed her complaint, the type of allegations now required by the majority's holding were unnecessary to state a cause of action for declaratory relief when challenging enforcement of CC&R's under the present circumstances. (See *Portola Hills Community Assn. v. James* (1992) 4 Cal.App.4th 289 [5 Cal.Rptr.2d 580]; *Bernardo Villas Management Corp. v. Black* (1987) 190 Cal.App.3d 153 [235 Cal.Rptr. 509].) Thus, in fairness, she should have the opportunity to rectify the deficiency in light of the majority's disapproval of these decisions. (See *Youngman v. Nevada Irrigation Dist.*, supra, 70 Cal.2d at p. 245.)

2. THE BURDEN.

Under the majority's construction of Civil Code section 1354, the pet restriction is unreasonable, and hence unenforceable, if the "burdens [imposed] on the affected land ... are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced." (Maj. opn., ante, at p. 382.) What, then, is the burden at issue here?

Both recorded and unrecorded history bear witness to the domestication of animals as household pets. 5 Throughout the ages, dogs and cats have provided human beings with a variety of services in addition to their companionship--shepherding flocks, guarding life and property, hunting game, ridding the house and barn of vermin. Of course, the modern classic example is the assist dog, which facilitates a sense of independence and security for disabled persons by enabling them to navigate their environment, alerting them to important sounds, and bringing the world within their reach. 6 Emotionally, they allow a connection full of sensation and delicacy of feeling.

FOOTNOTES

5 Archeologists in Israel found some of the earliest evidence of a domesticated animal when they unearthed the 12,000-year-old skeleton of a woman who was buried with her hand resting on the body of her dog. (Clutton-Brock, *Dog* (1991) p. 35.) Romans warned intruders "Cave canem" to alert them to the presence of canine protectors. (Id., p. 34.) Cats were known to be household pets in Egypt 5,000 years ago and often mummified and entombed with their owners. (Clutton-Brock, *Cat* (1991) p. 46.) According to the English Nuns Rule in 1205, "Ye shall not possess any beast, my dear sisters, except only a cat." (Crimmins, *The Quotable Cat* (1992) p. 58.)

6 Although it is possible only to estimate the total, well in excess of 10,000 individuals avail themselves of the benefits of guide, alert, and service dogs in California alone. (See Sen. Subcom. Interim Hg. on Guide, Signal, and Service Dogs (Nov. 15, 1990) pp. 1-42.) State law guarantees them the right to live with their animals free from discrimination on that basis. (See Gov. Code, § 12955, subd. (l) [impermissible discrimination under the Fair Employment and Housing Act (FEHA) "includes ... restrictive covenants, zoning laws, denial of use permits, and other actions ... that make housing opportunities unavailable." (Italics added.)]; see also Civ. Code, § 53; cf. 42 U.S.C. § 3601, 3604 (f)(3)(B) [federal fair housing act].) Thus, to the extent the pet restriction contains no exception for assist dogs, it clearly violates public policy. At oral argument, counsel for the association allowed that an individual who required assistance of this kind could seek a

waiver of the pet restriction, although he in no manner assured that the association's board would necessarily accede to such an effort to enforce the mandate of FEHA. In any event, this "concession" only serves to prove the point of discriminatory impact: disabled persons who have dogs to assist them in normalizing their daily lives do not have the equal access to housing guaranteed under state law if they must go, hat in hand as an Oliver Twist supplicant, to request an association board's "permission" to live as normal a life as they are capable of with canine assistance.

Throughout the ages, art and literature, as well as mythology, depict humans in all walks of life and social strata with cats and dogs, illustrating their widespread acceptance in everyday life. 7 Some religions have even incorporated them into their worship. 8 Dogs and cats are also admired for the purity of their character traits. 9 Closer to home, our own culture is populated with examples of the well-established place pets have found in our hearts and homes. 10

FOOTNOTES

7 For example, poetry runs the gamut from the doggerel of Ogden Nash to T.S. Eliot's "Old Possum's Book of Practical Cats."

8 Eastern religions often depict dogs as gods or temple guards. (See Clutton-Brock, Dog, supra, p. 35.) Ancient Egyptians considered the cat sacred, and their religion included the cat goddess Bastet. (See Clutton-Brock, Cat, supra, p. 47.)

9 For example, the Odyssey chronicles the faithfulness of Odysseus's dog. The legendary terrier "Greyfriars' Bobby" is synonymous with loyalty. In 1601, when the Earl of Southampton was being held in the Tower of London, his cat is reputed to have located his master's cell and climbed down the chimney to join him during his imprisonment. (Clutton-Brock, Cat, supra, p. 16.) And military annals document the wartime bravery and courage of dogs in the K-9 Corps.

10 The President and his family often set a national example in this regard. Chelsea Clinton's cat "Socks" is only the latest in a long line of White House pets, including Franklin Roosevelt's "Fala" and the Bushes' "Millie."

In addition to these historical and cultural references, the value of pets in daily life is a matter of common knowledge and understanding as well as extensive documentation. People of all ages, but particularly the elderly and the young, enjoy their companionship. Those who suffer from serious disease or injury and are confined to their home or bed experience a therapeutic, even spiritual, benefit from their presence. 11 Animals provide comfort at the death of a family member or dear friend, and for the lonely can offer a reason for living when life seems to have lost its meaning. 12 In recognition of these benefits, both Congress and the state Legislature have expressly guaranteed that elderly and handicapped persons living in public-assistance housing cannot be deprived of their pets. (12 U.S.C. § 1701r-1; Health & Saf. Code, § 19901.) Not only have children and animals always been natural companions, children learn responsibility and discipline from pet ownership while developing an important sense of kindness and protection for animals. 13 Single adults may find certain pets can afford a feeling of security. Families benefit from the experience of sharing that having a pet encourages. While pet ownership may not be a fundamental right as such, unquestionably it is an integral aspect of our daily existence, which cannot be lightly dismissed and should not suffer unwarranted intrusion into its circle of privacy.

FOOTNOTES

11 See, e.g., Siegel, Companion Animals: In Sickness and in Health (1993) 49 Journal of Social Issues 157.

12 See, e.g., Waltham Symposium 20, Pets, Benefits and Practice (BVA Publications 1990).

13 See, e.g., Melson, *The Benefits of Animals to Our Lives* (Fall 1990) *People, Animals, Environment* at pages 15-17.

3. THE BENEFIT.

What is gained from an uncompromising prohibition against pets that are confined to an owner's unit and create no noise, odor, or nuisance?

To the extent such animals are not seen, heard, or smelled any more than if they were not kept in the first place, there is no corresponding or concomitant benefit. Pets that remain within the four corners of their owners' condominium space can have no deleterious or offensive effect on the project's common areas or any neighboring unit. Certainly, if other owners and residents are totally unaware of their presence, prohibiting pets does not in any respect foster the "health, happiness [or] peace of mind" of anyone except the homeowners association's board of directors, who are thereby able to promote a form of sophisticated bigotry. In light of the substantial and disproportionate burden imposed for those who must forego virtually any and all association with pets, this lack of benefit renders a categorical ban unreasonable under Civil Code section 1354.

The proffered justification is all the more spurious when measured against the terms of the pet restriction itself, which contains an exception for domestic fish and birds. A squawking bird can readily create the very kind of disturbance supposedly prevented by banning other types of pets. At the same time, many animals prohibited by the restriction, such as hamsters and the like, turtles, and small reptiles, make no sound whatsoever. Disposal of bird droppings in common trash areas poses as much of a health concern as cat litter or rabbit pellets, which likewise can be handled in a manner that avoids potential problems. Birds are also known to carry disease and provoke allergies. Neither is maintaining fish without possible risk of interfering with the quiet enjoyment of condominium neighbors. Aquarium water must be changed and disposed of in the common drainage system. Leakage from a fish tank could cause serious water damage to the owner's unit, those below, and common areas. Defendants and the majority purport such solicitude for the "health, sanitation and noise concerns" of other unit owners, but fail to explain how the possession of pets, such as plaintiff's cats, under the circumstances alleged in her complaint, jeopardizes that goal any more than the fish and birds expressly allowed by the pet restriction. This inconsistency underscores its unreasonableness and discriminatory impact. 14

FOOTNOTES

14 On a related point, the association rules and regulations already contain a procedure for dealing with problems arising from bird and fish ownership. There appears no reason it could not be utilized to deal with similar concerns about other types of pets such as plaintiff's cats.

4. THE MAJORITY'S BURDEN/BENEFIT ANALYSIS.

From the statement of the facts through the conclusion, the majority's analysis gives scant acknowledgment to any of the foregoing considerations but simply takes refuge behind the "presumption of validity" now accorded all CC&R's irrespective of subject matter. They never objectively scrutinize defendants' blandishments of protecting "health and happiness" or realistically assess the substantial impact on affected unit owners and their use of their property. As this court has often recognized, "deference is not abdication." (*People v. McDonald* (1984) 37 Cal.3d 351, 377 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011].) Regardless of how limited an inquiry is permitted under applicable law, it must nevertheless be made.

Here, such inquiry should start with an evaluation of the interest that will suffer upon enforcement of the pet restriction. In determining the "burden on the use of land," due recognition must be given to the fact that this particular "use" transcends the impersonal and mundane matters typically regulated by condominium CC&R's, such as whether someone can place a doormat in the hallway or hang a towel on the patio rail or have food in the pool area, and reaches

the very quality of life of hundreds of owners and residents. Nonetheless, the majority accept uncritically the proffered justification of preserving "health and happiness" and essentially consider only one criterion to determine enforceability: was the restriction recorded in the original declaration? 15 If so, it is "presumptively valid," unless in violation of public policy. Given the application of the law to the facts alleged and by an inversion of relative interests, it is difficult to hypothesize any CC&R's that would not pass muster. 16 Such sanctity has not been afforded any writing save the commandments delivered to Moses on Mount Sinai, and they were set in stone, not upon worthless paper.

FOOTNOTES

15 The majority purport to rely on several out-of-state cases to support their conclusions as to the validity of the pet restriction. These decisions are either distinguishable or reflect the same lack of objective analysis. *Hidden Harbour Estates, Inc. v. Norman* (Fla. Dist. Ct. App. 1975) 309 So.2d 180 [72 A.L.R.3d 305], involved a prohibition against the consumption of alcoholic beverages in the condominium project club house, one of the common areas used by all the owners. *Hidden Harbour Estates v. Basso* (Fla. Dist. Ct. App. 1981) 393 So.2d 637 likewise did not concern a restriction on pets but a ban on the construction of private wells, which had the potential for creating serious salination problems in the common drinking water. Of those cases involving pet restrictions, only *Noble v. Murphy* (1993) 34 Mass. App. 452 [612 N.E.2d 266] dealt with a categorical prohibition (See *Dulaney Towers Maintenance v. O'Brey* (1980) 46 Md. App. 464 [418 A.2d 1233]; *Wilshire Condominium Ass'n, Inc. v. Kohlbrand* (Fla. Dist. Ct. App. 1979) 368 So.2d 629.) The court there also failed to give any consideration to the qualitative nature of the restriction or the burden it imposed on those arbitrarily deprived of the opportunity to own pets that could be confined to their units and kept without disturbing the quiet enjoyment of other unit owners.

16 Under the facts of this case, the majority do more than simply accord the restriction a presumption of reasonableness. They encourage and endorse the enforcing body to disregard the privacy interests of law-abiding property owners. If pets are maintained in the manner alleged in plaintiff's complaint, then only snoopers are in a position to claim a violation of the restriction.

Moreover, unlike most conduct controlled by CC&R's, the activity at issue here is strictly confined to the owner's interior space; it does not in any manner invade other units or the common areas. Owning a home of one's own has always epitomized the American dream. More than simply embodying the notion of having "one's castle," it represents the sense of freedom and self-determination emblematic of our national character. Granted, those who live in multi-unit developments cannot exercise this freedom to the same extent possible on a large estate. But owning pets that do not disturb the quiet enjoyment of others does not reasonably come within this compromise. Nevertheless, with no demonstrated or discernible benefit, the majority arbitrarily sacrifice the dream to the tyranny of the "commonality."

5. CONCLUSION.

Our true task in this turmoil is to strike a balance between the governing rights accorded a condominium association and the individual freedom of its members. To fulfill that function, a reviewing court must view with a skeptic's eye restrictions driven by fear, anxiety, or intolerance. In any community, we do not exist in vacuo. There are many annoyances which we tolerate because not to do so would be repressive and place the freedom of others at risk.

In contravention, the majority's failure to consider the real burden imposed by the pet restriction unfortunately belittles and trivializes the interest at stake here. Pet ownership substantially enhances the quality of life for those who desire it. When others are not only undisturbed by, but completely unaware of, the presence of pets being enjoyed by their neighbors, the balance of benefit and burden is rendered disproportionate and unreasonable, rebutting any presumption of validity. Their view, shorn of grace and guiding philosophy, is devoid of the humanity that must

temper the interpretation and application of all laws, for in a civilized society that is the source of their authority. As judicial architects of the rules of life, we better serve when we construct halls of harmony rather than walls of wrath.

I would affirm the judgment of the Court of Appeal.

**FOURTH LA COSTA CONDOMINIUM OWNERS ASSOCIATION, Petitioner and Respondent, v.
BARBARA SEITH, Objector and Appellant.**

D049276

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

159 Cal. App. 4th 563; 71 Cal. Rptr. 3d 299; 2008 Cal. App. LEXIS 147

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COUNSEL: Feist, Vetter, Knauf and Loy and Alan H. Burson for Objector and Appellant.

No appearance for Petitioner and Respondent.

JUDGES: Opinion by McConnell, P. J., with Huffman and Nares, JJ., concurring.

OPINION BY: McConnell

OPINION

McCONNELL, P. J.—Barbara Seith appeals an order the trial court entered that reduced the percentage of votes necessary to amend the Fourth La Costa Condominium Owners Association's (Owners Association) declaration of covenants, conditions and restrictions (CC&R's) (Civ. Code, (1) § 1356) and bylaws (Corp. Code, § 7515). Seith challenges the order on the grounds the underlying vote was invalid because it was by mail ballot, the ballot was not secret, the Owners Association made an insufficient effort to permit all owners to vote, and there was insufficient evidence of lender acquiescence; the court exceeded its statutory authority and applied an improper standard; certain provisions of the amendment are unreasonable; and section 1356 is unconstitutional as it impairs the obligation of contracts. We affirm the order.

FOOTNOTES

1 Undesignated statutory references are to the Civil Code.

FACTUAL AND PROCEDURAL BACKGROUND

The 48-unit Fourth La Costa condominium development was governed by CC&R's and bylaws recorded in 1969. Both documents provided they may be amended only by an affirmative vote of not less than 75 percent of the owners.

In 2004 the Owners Association decided the CC&R's and bylaws should be amended because some provisions were superseded by changes in the law, other provisions were ambiguous and had caused confusion, and provisions pertaining to developer rights and obligations no longer applied. In an August 29, 2005 letter to owners, the Owners Association asked for an affirmative vote on the first restated CC&R's, which contain dozens of new provisions and the amendment of numerous original provisions, and on amended bylaws. The letter notified owners of the 75 percent vote requirement, and of an October 1 informational meeting. It requested the return of ballots by October 7.

In a September 2005 newsletter, the Owners Association reminded owners to vote. Many owners did not return their ballots, and on October 11 the Owners Association sent a memorandum and another ballot to each owner who had not voted, and it extended the deadline for voting to October 21.

In February 2006 the Owners Association filed a petition in the superior court for an order under section 1356 to reduce the percentage of affirmative votes needed to amend the CC&R's. The petition stated 25 owners voted in favor of the amendment, 11 owners voted against it, and 12 owners did not return their ballots. The petition prayed that the first restated CC&R's "be ordered approved based upon the number of affirmative votes actually cast constituting at least a majority of owners."

In July 2006 the Owners Association filed a supplemental petition under Corporations Code section 7515 to reduce the percentage of affirmative votes necessary to approve the bylaws.

Seith owns and leases out two condominiums at Fourth La Costa. She filed a written objection to the petitions on various grounds, including that the proposed amendments imposed "onerous terms and burdens on the leasing of units."

In a tentative ruling, the court granted the petitions. After an August 16, 2006 hearing, the court took the matter under submission. On August 21 it confirmed its tentative ruling.

DISCUSSION (2)

FOOTNOTES

2 The Owners Association did not file a respondent's brief, and thus we decide the appeal based on the record, the opening brief and any oral argument by Seith. (Cal. Rules of Court, rule 8.220(a)(2).)

I

Validity of Vote

A

1

"[S]ection 1356, part of the Davis-Stirling Common Interest Development Act ... , provides that a homeowners association, or any member, may petition the superior court for a reduction in the percentage of affirmative votes required to amend the CC&R's if they require approval by 'owners having more than 50 percent of the votes in the association' [Citation.] The court may, but need not, grant the petition if it finds all of the following: Notice was properly given; the balloting was properly conducted [in accordance with all applicable provisions of the governing documents]; reasonable efforts were made to permit eligible members to vote; '[o]wners having more than 50 percent of the votes, in a single class voting structure, voted in favor of the amendment'; and '[t]he amendment is reasonable.' " (Peak Investments v. South Peak Homeowners Assn., Inc. (2006) 140 Cal.App.4th 1363, 1366-1367 [44 Cal. Rptr. 3d 892], fn. omitted.)

"Viewed objectively, the purpose of ... section 1356 is to give a property owners' association the ability to amend its governing documents when, because of voter apathy or other reasons, important amendments cannot be approved by the normal procedures authorized by the declaration. [Citation.] In essence, it provides the association with a safety valve for those situations where the need for a supermajority vote would hamstring the association." (Blue Lagoon Community Assn. v. Mitchell (1997) 55 Cal.App.4th 472, 477 [64 Cal. Rptr. 2d 81].)

Because section 1356 gives the trial court broad discretion in ruling on a petition (§ 1356, subd. (c)), we review its ruling for abuse of discretion. "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered." (Denham v. Superior Court (1970) 2 Cal.3d 557, 566 [86 Cal. Rptr. 65, 468 P.2d 193].)

2

Seith contends the vote here was not "conducted in accordance with all applicable provisions of the governing documents," as required by section 1356, subdivision (c)(2), because it was by mail ballots. She concedes, however, that there is statutory authority for mail ballots. Corporations Code section 7513, subdivision (a) provides that "unless prohibited in the articles or bylaws, any action which may be taken at any regular or special meeting of members may be taken without a meeting if the corporation distributes a written ballot to every member entitled to vote on the matter."

Seith cites the bylaws as stating they "may only be amended 'at a regular or special meeting of members.'" The bylaws, however, actually provide they "may be amended, at a regular or special meeting of the members." 3 (Italics added.) Seith also cites the CC&R's requirement there must be an affirmative "vote" of at least 75 percent of owners. A vote, however, may be made at a meeting or by mail ballots.

FOOTNOTES

3 Technically, the bylaws were amended under Corporations Code section 7515 rather than Civil Code section 1356, as discussed below.

Seith ultimately acknowledges the governing documents did not prohibit mail ballots. She asserts, however, that since the governing documents did not expressly authorize mail ballots, and the authority for their use was purely statutory, the vote was not in accordance with the governing documents and the Owners Association was thus precluded from obtaining relief from the supermajority vote requirement under section 1356.

The interpretation of statutes presents questions of law we review independently. (Board of Retirement v. Lewis (1990) 217 Cal. App. 3d 956, 964 [266 Cal. Rptr. 225].) Seith cites no authority that supports her position, and we find it unpersuasive. The Legislature intends to allow mail ballots unless they are expressly prohibited by the governing documents, and their use would run afoul of section 1356, subdivision (c)(2) only if the governing documents prohibited their use.

3

Additionally, Seith cites Corporations Code section 7513, subdivision (b), which provides that "[a]pproval by written ballot pursuant to this section shall be valid only when the number of votes cast by ballot ... equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot."

Seith asserts Corporations Code section 7513, subdivision (b) and Civil Code section 1356 have "equal legislative dignity, and neither prevails over the other." She asserts section 1356 "permits the court to ignore supermajority requirements of the association's CC&R's, but it does [not] permit the court to ignore express provisions of other statutes. By granting the petition under [section] 1356 where the vote was only valid because of the provisions of [Corporations Code section 7513, subdivision (a)], the court disregarded the express language of [Corporations Code section 7513, subdivision (b)], which here mandates 75 [percent] owner approval." In other words, Seith again takes the position that when mail ballots are used an association may never petition under section 1356 for relief from a supermajority vote requirement.

We disagree. As the court explained in its order, "the relief requested in the petition is exactly the type for which judicial intervention under Civil Code [section] 1356 is deemed proper as only 69 [percent] of the owners have responded despite the efforts of the [Owners] Association to increase participation." There is no suggestion the Legislature intended to limit the reach of section 1356 to votes taken at a regular or special meeting, and we see no reason for such a distinction. If an election is held at a meeting, the governing documents may be amended only if the percentage of affirmative votes required by the governing documents is cast, or the association obtains relief under section 1356. As there is no evidence of legislative intent to the contrary, the same rule should apply to votes by mail ballot.

B

Alternatively, Seith contends the vote violated section 1355, subdivision (b), under which an amendment to CC&R's is effective only after "the proposed amendment has been distributed to all of the owners of separate interests in the common interest development by first-class mail postage prepaid or personal delivery not less than 15 days and not more than 60 days prior to any approval being solicited." Seith complains that the Owners Association distributed the proposed amendment and ballots at the same time, and thus gave owners an unreasonably short time within which to evaluate the issues and mount an opposition.

Subdivision (b) of section 1355, however, is inapplicable. Subdivision (a) of section 1355 provides the "declaration may be amended pursuant to the governing documents or this title [div. 2, pt. 4, tit. 6 of the Civ. Code, 'Common Interest Developments']". Except as provided in Section 1356, an amendment is effective after ... the approval of the percentage of owners required by the governing documents has been given." (Italics added.) The Owners Association proceeded under its governing documents, not section 1355, and when a supermajority affirmative vote was not cast, it proceeded under section 1356.

Seith asserts the vote here was pursuant to division 2, part 4, title 6 of the Civil Code, and not the governing documents, because the vote was by mail ballots instead and a supermajority affirmative vote was not cast. As discussed, however, Corporations Code section 7513, subdivision (a) authorized the mail ballots. Further, the lack of a supermajority affirmative vote does not mean the vote was not conducted under the governing documents within the meaning of Civil Code section 1356, subdivision (c)(2). Rather, the lack of a supermajority affirmative vote made a petition for relief under section 1356 appropriate.

C

Further, Seith contends the vote was invalid because it was not by secret ballot. She cites section 1363.03, subdivision (b), which provides that "[n]otwithstanding any other law or provision of the governing documents, elections regarding ... amendments to the governing documents ... shall be held by secret ballot in accordance with the procedures set forth in this section." The statute is inapplicable, however, because it was not effective until July 1, 2006, nearly nine months after the vote here. Contrary to Seith's view, the dates of filing of the Owners Association's petitions and the trial court's order are immaterial. At the relevant time, the Owners Association was not required to conduct the vote by secret ballot. Indeed, Seith concedes the legislative history shows that before the enactment of section 1363.03, ballots in common interest developments were not required by law to be secret.

D

Seith also contends the vote is invalid because there is insufficient evidence of acquiescence by lenders. The original CC&R's provided that in addition to a supermajority vote of owners, they may be amended "provided written notice of the proposed amendment is sent to all lenders and a written consent is obtained of seventy-five percent ... of the lenders holding the beneficial interests in any Mortgages or Trust Deeds of record as valid liens against said project or any portion thereof, provided, however, that the lender shall not unreasonably withhold their consents."

The Owners Association's original petition averred that through its legal counsel it "mailed letters and ballots to the holders of the Mortgages as required [by] ... the CC&Rs. These letters were sent via Certified Mail, Return Receipt Requested ('RRR') and the letter informed the Mortgagees that the signature on the RRR would be deemed consent of the proposed [amended] CC&Rs, unless a ballot was returned within thirty ... days. ... As of February 8, 2006, over 75 [percent] of the Mortgagees had signed the RRR. One ... lender indicated that it could not consent because it did not have a copy of the original CC&Rs." The petition included a copy of the letter and the ballot sent to the lenders.

As the court noted, the CC&R's required an affirmative vote of owners, but only written consent by lenders. The court explained that "[t]his would tend to indicate that the CC&R's, as originally drafted, contemplated a distinction between the forms of approval required from each group, with the approval from the latter group being more relaxed in form. The CC[&]R's did not specify the method by which the consent may be obtained. [The Owners Association's] method of assuring receipt of the proposed changes by the lenders and thereafter providing them with 30 days within which to reject the changes is as good as any." We agree with the court's assessment.

E

Seith also contends the Owners Association violated section 1356, subdivision (c)(3), which requires an association to make a "reasonably diligent effort ... to permit all eligible members to vote on the proposed amendment."

In support of its petitions, the Owners Association submitted the declaration of Ashley Rosas, a management consultant who oversees its day-to-day operations. The declaration stated the Owners Association maintains a list of all current record owners, and Rosas's staff used the list to mail the proposed CC&R's and ballots to owners on August 29, 2005. The declaration also stated that in mid-September a reminder memorandum was sent to owners who did not respond, another reminder was included in the Owner Association's September newsletter, on October 1 it conducted a special meeting regarding the proposed amendment, and on October 11 another reminder and ballots were sent to owners who had still not responded.

Seith submits that "further solicitation [of owners who did not vote] was likely [to lead] to outright defeat," and thus the Owners Association had "no incentive to seek more votes." Seith submitted no evidence pertaining to the Owners Association's motives, and her position is mere speculation. Perhaps, as Seith asserts, it would not have been onerous for the Owners Association to try to reach by telephone the 12 owners who did not vote. We conclude, however, that its efforts were sufficient to satisfy section 1356, subdivision (c)(3). The vote was valid.

II

Trial Court's Statutory Authority

A

Next, Seith contends the trial court exceeded the authority of section 1356, subdivision (d), which provides: "If the court makes the findings required by subdivision (c), any order issued pursuant to this section may confirm the amendment as being validly approved on the basis of the affirmative votes actually received during the balloting period or the order may dispense with any requirement relating to quorums or to the number or percentage of votes needed for approval of the amendment that would otherwise exist under the governing documents."

The proposed amendment to the CC&R's changes the supermajority vote for their amendment to a majority vote. The original CC&R's, however, provided they "shall not be amended to allow amendments by vote of less than seventy-five percent ... of the Owners." Seith asserts the original CC&R's may never be amended to allow a majority vote.

The issue is one of contract interpretation. "The same rules that apply to interpretation of contracts apply to the interpretation of CC&R's." (Chee v. Amanda Goldt Property Management (2006) 143 Cal.App.4th 1360, 1377 [50 Cal. Rptr. 3d 40].) " 'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' [Citation.] 'Where the language of a contract is clear and not absurd, it will be followed.' " (Templeton Development Corp. v. Superior Court (2006) 144 Cal.App.4th 1073, 1085 [51 Cal. Rptr. 3d 19]; see § 1638 ["The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."].)

At the trial court, the Owners Association argued the original CC&R's unreasonably restricted it from amending the document, and requiring it to obtain the approval of 75 percent of owners "for each and every amendment, stagnates [it] from being able to update the CC&Rs and to reflect the desires of the community. The fact that the CC&Rs have not been amended since 1969 is proof of the unreasonable hold the current amendment provision has on this community."

The court found reasonable the provision of the first restated CC&R's to allow a majority vote to amend the document, and we agree. It would be rather absurd to allow the governing documents to restrict an association's ability to amend the document in perpetuity, even if, for instance, 100 percent of the owners preferred a majority vote rather than a supermajority vote. Accordingly, the court did not exceed its authority under section 1356 by approving the majority vote amendment.

B

Seith also contends the court exceeded its authority under section 1357. Under subdivision (a) of section 1357, the Legislature "finds and declares that it is in the public interest to provide a vehicle for extending the term of the declaration if owners having more than 50 percent of the votes in the association choose to do so." Subdivision (b) of section 1357 provides that a "declaration which specifies a termination date, but which contains no provision for extension of the termination date, may be extended by the approval of owners having more than 50 percent of the votes in the association or any greater percentage specified in the declaration for an amendment thereto. If the approval of owners having more than 50 percent of the votes in the association is required to amend the declaration, the term of the declaration may be extended in accordance with Section 1356." (Italics added.)

Under subdivision (d) of section 1357, "[n]o single extension of the terms of the declaration made pursuant to this section shall exceed the initial term of the declaration or 20 years, whichever is less. However, more than one extension may occur pursuant to this section." Here, the original CC&R's provided for a term of 40 years from the date of recordation, December 9, 1969, but they also provided that after the 40-year period they shall be automatically extended for successive 10-year periods. The first restated CC&R's provide they are in effect until December 31, 2055, after which they shall be automatically extended for successive 10-year periods. Seith asserts the extension to 2055 violates subdivision (d) of section 1357.

Section 1357, however, is inapplicable here because the original CC&R's had an automatic renewal provision, and the statute plainly applies only to CC&R's that have a termination date and do not provide for an extension. In enacting the statute, the Legislature was concerned that "there are common interest developments that have been created with deed restrictions which do not provide a means for the property owners to extend the term of the declaration. ... [C]ovenants and restrictions, contained in the declaration, are an appropriate method for protecting the common plan of developments and to provide for a mechanism for financial support for the upkeep of common areas If declarations terminate prematurely, common interest developments may deteriorate and the housing supply of affordable units could be impacted adversely." (§ 1357, subd. (a).) Had the Legislature intended to limit the extension of any CC&R's to 20-year periods it could easily have said so.

III

Section 1356's Reasonableness Standard

Seith contends the trial court violated section 1356, subdivision (c)(5) by not applying a reasonableness standard, and instead applying a deferential standard under *Nahrstedt v. Lakeside Village Condominium Assn., Inc.* (1994) 8 Cal.4th 361 [33 Cal. Rptr. 2d 63, 878 P.2d 1275] (*Nahrstedt*).

In *Nahrstedt*, our high court interpreted section 1354, subdivision (a), under which recorded CC&R's are enforceable equitable servitudes "unless unreasonable." The court held CC&R's are unreasonable if they are "wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit." (*Nahrstedt*, supra, 8 Cal.4th at p. 382.) The prior version of the statutory provision (former § 1355) stated " 'restrictions shall be enforceable equitable servitudes where reasonable,' " and the court concluded the shift from " 'where reasonable' " to the double negative " 'unless unreasonable' " signaled the Legislature's intent to "cloak[] use restrictions contained in a condominium development's recorded declaration with a presumption of reasonableness by shifting the burden of proving otherwise to the party challenging the use restrictions." (*Nahrstedt*, at p. 380, italics added in *Nahrstedt*; see also *Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 79 [14 Cal. Rptr. 3d 67, 90 P.3d 1223].)

We agree with Seith that since section 1356 pertains to proposed amendments to CC&R's, rather than recorded CC&R's, and it does not contain the "unless unreasonable" language of section 1354, there is no presumption of reasonableness under section 1356 and the party petitioning for relief from a supermajority vote requirement has the burden of proving reasonableness. The term "reasonable" in the context of use restrictions has been variously defined as "not arbitrary or capricious" (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal. App. 3d 766, 772 [224 Cal. Rptr. 18]; see *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 266 [87 Cal. Rptr. 2d 237, 980 P.2d 940]), "rationally related to the protection, preservation and proper operation of the property and the purposes of the Association as set forth in its governing instruments," and "fair and nondiscriminatory." (*Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal. App. 3d 670, 680 [174 Cal.Rptr. 136].)

Here, in discussing 11 specific issues Seith raised, on three instances the court found provisions of the first restated CC&R's not "unreasonable." The order, however, also expressly acknowledges section 1356 imposes a reasonableness requirement; it states the "[p]etitioner has satisfied the elements of ... section 1356," and the court "finds that all of the proposed changes with which the objecting party takes issue are indeed reasonable and that it does not appear that the amendments are for an improper purpose." (Italics added.) Accordingly, the order establishes the court applied the correct burden of proof and a standard of reasonableness.

Further, when the court properly places the burden of proof on the party petitioning under section 1356, its finding that a proposed amendment is not unreasonable, as opposed to reasonable, is of no real import. As the court explained in *Nahrstedt*, the differences between the terms "where reasonable" and "unless unreasonable" under section 1354 and its predecessor were germane to the issue of whether there is a presumption of validity and the allocation of burden of proof. A CC&R is unreasonable if it is arbitrary and capricious, violates the law or a fundamental public policy or imposes an undue burden on property, and it is reasonable unless it meets those criteria. (See 9 *Miller & Starr, Cal. Real Estate* (3d ed. 2007) § 25B:13, pp. 25B-42 to 25B-43.) We find no error.

IV

Objections to Specific Provisions

A

Seith complains that article IV, section 2(K) of the first restated CC&R's eliminates an owner's right to an assigned parking space in the common area. The original CC&R's provided that the Owners Association "shall" "assign to each Unit ... the right to use one ... parking space contained within the Common Area. ... The [Owners] Association, however, reserves the right to re-assign and re-allocate said parking spaces in such manner and at such time as it may deem reasonably necessary for the benefit of all of the Owners of all of the Units." The first restated CC&R's have the same language, but use the term "may" instead of "shall" with regard to the assignment of common area parking spaces to units.

At the trial court, the Owners Association explained that when the CC&R's were originally adopted in 1969, common area parking spaces had not been assigned to the units, but shortly after their adoption parking spaces were assigned to the units and the assignments continue. The Owners Association argued the previous version was outdated because it no longer has any affirmative duty to assign spaces to the units since that task has been completed.

We disagree with Seith's speculation that under the amendment the Owners Association may take assigned spaces away from units, as it cannot reassign spaces under the first restated CC&R's unless reassignment is necessary for the benefit of all owners. Taking spaces away from owners would not benefit them. Although the amended provision could have been drafted more clearly, under the circumstances we find it reasonable.

B

1

Article VI, section 3(A) of the first restated CC&R's states: "Except as may be required by legal proceedings or authorized by the Association's Rules, no commercial signs, billboards, real estate flags or advertising of any kind shall be maintained or permitted on any portion of the Development except for one 'For Sale' or 'For Rent' sign per Unit, not larger than 18 [inches] by 24 [inches]. The sign must be professionally printed, be maintained in good condition, and may only be posted in the window and may not be posted on the railings of balconies or locations on the buildings. ... All signs must be removed within three ... days of close of escrow or lease of the Unit."

Seith contends the provision violates section 1353.6, which, as of January 1, 2004, limits an association's restrictions on noncommercial signs. The statute provides: "(a) The governing documents ... may not prohibit posting or displaying of noncommercial signs, posters, flags, or banners on or in an owner's separate interest, except as required for the protection of public health or safety or if the posting or display would violate a local, state, or federal law. [¶] (b) For the purposes of this section, a noncommercial sign, poster, flag, or banner may be made of paper, cardboard, cloth, plastic, or fabric, and may be posted or displayed from the yard, window, door, balcony, or outside wall of the separate interest [¶] (c) An association may prohibit noncommercial signs and posters that are more than 9 square feet in size and noncommercial flags or banners that are more than 15 square feet in size."

In enacting the statute, the Legislature intended to provide: " '(a) That homeowners throughout the state shall be able to engage in constitutionally protected free speech traditionally associated with private residential property. [¶] (b) That owners of a separate interest in a common interest development shall be specifically protected from unreasonable restrictions on this right in the governing documents.' " (Historical and Statutory Notes, 8 West's Ann. Civ. Code (2007 ed.) foll. 8 1353.6, p. 184.)

In accordance with section 1353.6, article VI, section 3(B) of the first restated CC&R's does allow the display of noncommercial signs not exceeding nine square feet "from the yard, window, door, balcony, or outside walls of the Units and must be, made of paper, cardboard, cloth, plastic, or fabric." Seith essentially asserts that for sale and for lease signs should be included within that

provision because they are noncommercial, based on a dictionary definition of "commercial" as "engaged in commerce or work intended for commerce." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 249, col. 2.) She asserts that a typical owner is not engaged in buying and selling units, and is thus not engaged in commerce.

It is established, however, that signs advertising property for sale or for lease constitute commercial speech as the advertiser's interest is purely economic. (Linmark Associates, Inc. v. Willingboro (1977) 431 U.S. 85, 92, 98 [52 L. Ed. 2d 155, 97 S. Ct. 1614]; Kennedy v. Avondale Estates, Ga. (N.D.Ga. 2005) 414 F. Supp. 2d 1184, 1198-1199.) "[C]ommercial speech is that which 'propose[s] a commercial transaction.' " (Kennedy v. Avondale, at p. 1198, citing Va. Pharmacy Bd. v. Va. Consumer Council (1976) 425 U.S. 748, 762 [48 L. Ed. 2d 346, 96 S. Ct. 1817].) As section 1353.6 pertains only to noncommercial speech it is inapplicable here.

2

Alternatively, Seith contends that even if for sale and for lease signs are commercial, the restrictions on their size and placement violate section 712, subdivision (a), which provides: "Every provision contained in or otherwise affecting a grant of a fee interest in ... real property in this state ... , which purports to prohibit or restrict the right of the property owner ... to display ... on the real property, or on real property owned by others with their consent, or both, signs which are reasonably located, in plain view of the public, are of reasonable dimensions and design, and do not adversely affect public safety, ... and which advertise the property for sale, lease, or exchange, or advertise directions to the property, by the property owner or his or her agent is void as an unreasonable restraint upon the power of alienation." (Italics added.) A sign may include directions to the property, the owners' or the agent's name, address and telephone number, and it is deemed to be of reasonable dimension and design if it complies with a local sign ordinance. (§§ 712, subd. (c), 713, subd. (a).)

Section 712 applies to the placement of signs on an owner's "real property." In a condominium project, however, unit owners ordinarily have no separate interest in the real property. Subdivision (f) of section 1351 provides: "A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit, the boundaries of which are described on a recorded final map, parcel map, or condominium plan The area within these boundaries may be filled with air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support. ... The portion or portions of real property held in undivided interest may be all of the real property, except for the separate interests An individual condominium within a condominium project may include, in addition, a separate interest in other portions of the real property."

Further, the balconies, exterior doors and walls of units are also common areas. Section 1351, subdivision (i) provides: "(i) 'Exclusive use common area' means a portion of the common areas designated by the declaration for the exclusive use of one or more, but fewer than all, of the owners of the separate interests and which is or will be appurtenant to the separate interest or interests. [¶] (1) Unless the declaration otherwise provides ... [as here] any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, doorframes, and hardware incident thereto, screens and windows or other fixtures designed to serve a single separate interest, but located outside the boundaries of the separate interest, are exclusive use common areas allocated exclusively to that separate interest."

Here, the original CC&R's defined a "Unit" as "any portion of a building located on The Properties designed and intended for use and occupancy as a residence ... , the boundaries of each unit are the interior surfaces of the ceiling, floors, perimeter walls, windows and doors thereof; which ... boundaries include the air space so encompassed and the portions of the building located within [the] air space." The CC&R's defined "Common area" as "all land and improvements, and all portions of the divided property not located with any unit."

We conclude that under the plain language of section 712, subdivision (a), a condominium owner in a project such as Fourth La Costa has no right to post for sale and for lease advertisements in the common areas. Had the Legislature intended to extend such a right it could have expressly stated so. 4 While an association may not ban such advertisements entirely (see *Linmark Associates, Inc. v. Willingboro*, supra, 431 U.S. 85, 92, 98), to protect all owners it may impose reasonable restrictions for aesthetic purposes (id. at p. 93). Here, the amendment allows an owner to post a sign in the window of his or her unit, and it is undisputed that such a sign would be viewable to the public. Seith claims the size restriction of 18 inches by 24 inches "would prohibit the typical professional real estate broker sign," but she did not provide the trial court with any supporting evidence. Moreover, we see no problem with allowing only one sign per unit, or requiring that signs be removed within three days of a lease or sale. Article IV, section 3(A) of the first restated CC&R's is reasonable.

FOOTNOTES

4 Commentators on common interest developments indicate that sections 712 and 713 apply to common interest developments, but they do not discuss any right of owners to place for sale or for lease signs in common areas. (See, e.g., 1 *Sproul & Rosenberry, Advising Cal. Common Interest Communities (Cont.Ed.Bar 2007)* § 6.7, pp. 389-391 (hereafter *Sproul & Rosenberry*); *Hanna & Van Atta, Cal. Common Interest Developments: Law and Practice (2007)* § 22.61, pp. 1675-1678 (hereafter *Hanna & Van Atta*.) *Sproul and Rosenberry* explain that "[l]ike so many other Davis-Stirling Act statutory provisions that seek to regulate a subject matter addressed in other California statutes that are applicable to common interest communities, no effort is made to clearly integrate the new statutory rules with pre-existing laws pertaining to the same subject. For example, new [Civil Code section] 1353.6 suggests that governing documents could prohibit any form of commercial expression by signs, banners, and the like, and yet [Civil Code sections] 712 and 713 have for many years prohibited private covenants from prohibiting or restricting the right of owners to display signs of reasonable dimension, design, and location that advertise the owner's property for sale, lease, or exchange." (1 *Sproul & Rosenberry*, supra, § 6.7, pp. 390-391.)

C

Further, Seith contends article VI, section 1(B) of the first restated CC&R's increases the costs and burdens of owners who lease their units, because it requires leases to be in writing and to state the tenant is bound by the provisions of the CC&R's. At the trial court, the Owners Association explained "there are many situations where a tenant is in violation of the governing documents and notice to the Owner regarding the tenant's violations have gone unheeded." The Owners Association sought written leases to ensure that provisions of the CC&R's are contained in the lease, as lessees would not otherwise be bound to follow them. "When the declaration permits leasing, a community association faces enforcement problems if an owner's tenant engages in conduct that violates other declaration provisions." (1 *Sproul & Rosenberry*, supra, § 6.45, p. 423.) Article VI, section 1(B) is reasonable.

Seith claims the provision makes tenants responsible for assessments and maintenance costs and "[n]o tenant in their right mind would agree to undertake that liability." The first restated CC&R's, however, specifies that assessments are the personal obligations of owners. The CC&R's pertain to a tenant's conduct insofar as permitted uses are concerned. For instance, with limited exception each residence may be used only for residential purposes, each residence may have only a reasonable number of pets, and no temporary structures are allowed. Potential tenants should not be concerned about any liability for assessments against an owner. 5

FOOTNOTES

5 Seith also challenges the reasonableness of article V, section 8 of the first restated CC&R's, which authorizes the collection of interest on unpaid assessments; and article V, section 9, which pertains to the recordation of liens for delinquent assessments. She did not, however, address

those provisions at the trial court. "As a general rule, failure to raise a point in the trial court constitutes ... waiver and appellant is estopped to raise that objection on appeal." (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal. App. 3d 158, 167 [143 Cal. Rptr. 633].) The first restated CC&R's contain dozens of new provisions and amended provisions, and the trial court could not be expected to comb through them and independently research each one to determine its reasonableness. It was incumbent on Seith to raise all objections she had.

V

Amendment of Bylaws

The original bylaws, adopted in 1969, provided they could be amended by a vote of not less than 75 percent of all votes entitled to be cast. In its supplemental petition, the Owners Association sought a reduction in the percentage of required votes. It cited Corporations Code section 7515, subdivision (a) which provides: "If for any reason it is impractical or unduly difficult for any corporation to call or conduct a meeting of its members, ... or otherwise obtain their consent, in the manner prescribed by its articles or bylaws, or this part, then the superior court ... , upon petition ... , may order that such a meeting be called or that a written ballot or other form of obtaining the vote of members ... be authorized, in such a manner as the court finds fair and equitable under the circumstances."

The statute further provides: "The order issued pursuant to this section may dispense with any requirement relating to the holding of and voting at meetings or obtaining of votes, including any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by the articles, bylaws, or this part." (Corp. Code, § 7515, subd. (c).) As with Civil Code section 1356, Corporations Code section 7515 is intended to ?overcome membership voting apathy.? (*Greenback Townhomes Homeowners Assn. v. Rizan* (1985) 166 Cal. App. 3d 843, 849 [212 Cal. Rptr. 678].)

Seith asserts Corporations Code section 7515 authorizes the court to order only a prospective vote, and it erred by approving a vote retrospectively. In rejecting that interpretation, commentators have explained: "Corporations Code [section] 7515[, subdivision] (a) seems prospective in permitting the court to order 'that such a meeting be called or that a written ballot ... be authorized in such a manner as the court finds fair and equitable.' Under this interpretation the court could act prospectively to relax voting or meeting requirements only as they apply to meetings or requests for member approvals that occur after the association has failed in its efforts to obtain member approvals or to conduct meetings in accordance with applicable bylaw, article, or statutory requirements. Corporations Code [section] 7515[, subdivision] (c), however, permits the order to 'dispense with any requirement relating to the holding of and voting at meetings or obtaining of votes.' Thus, a more reasonable interpretation of [section] 7515 would be that the court may, as empowered under [Civil Code section] 1356 with regard to the declaration, retroactively approve amendments to the articles and bylaws." (2 *Sproul & Rosenberry*, supra, § 9.44, pp. 682-683.)

We agree with that assessment, particularly since Civil Code section 1356, which applies to the amendment of CC&R's, was patterned after Corporations Code section 7515. (2 *Sproul & Rosenberry*, supra, § 9.30, p. 660.) The Owners Association established the apathy of a substantial percentage of owners and that the supermajority requirement precluded it from amending the bylaws as well as the CC&R's. We are unaware of any reason to allow relief from the supermajority vote requirement after a vote has already been taken in the context of CC&R's—which are central to the establishment, operation and maintenance of a common interest development and ordinarily control in the event of a conflict with the bylaws (*Hanna & Van Atta*, supra, § 1.30, pp. 28-29; *id.*, § 18:19, pp. 1103-1104)—but only allow prospective relief in the context of bylaws. We find no error.

VI

Constitutionality of Section 1356

A

Seith contends that as applied retroactively to the original CC&R's, section 1356 is an unconstitutional impairment of the obligation of contracts. 6 Article I, section 10 of the United States Constitution states: "No State shall ... pass any ... Law impairing the Obligation of Contracts." Article I, section 9 of the California Constitution provides: "A ... law impairing the obligation of contracts may not be passed."

"The language of these constitutional provisions 'appears unambiguously absolute' [Citation.] However, the provisions have not been so treated by the courts. 'Read literally, these provisions appear to proscribe any impairment. However, it has long been settled that the proscription is "not an absolute one and is not to be read with literal exactness like a mathematical formula." [Citation.]' " (Hall v. Butte Home Health, Inc. (1997) 60 Cal.App.4th 308, 318 [70 Cal. Rptr. 2d 246].)

FOOTNOTES

6 Seith also contends Corporations Code section 7515 impairs the obligations of contracts, but she did not preserve the issue for appellate review by raising it at the trial court. (Hale v. Morgan (1978) 22 Cal.3d 388, 394 [149 Cal. Rptr. 375, 584 P.2d 512].)

"As the United States Supreme Court has interpreted the federal contracts clause, contracts clause questions turn on a three-step analysis. [Citation.] The first and threshold step is to ask whether there is any impairment at all, and, if there is, how substantial it is. [Citation.] If there is no 'substantial' impairment, that ends the inquiry. If there is substantial impairment, the court must next ask whether there is a 'significant and legitimate public purpose' behind the state regulation at issue. [Citation.] If the state regulation passes that test, the final inquiry is whether means by which the regulation acts are of a 'character appropriate' to the public purpose identified in step two." (Barrett v. Dawson (1998) 61 Cal.App.4th 1048, 1054-1055 [71 Cal. Rptr. 2d 899].) The same analysis is applicable to the state Constitution's contract clause. (61 Cal.App.4th at p. 1056.)

"The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them." (Home Bldg. & L. Assn. v. Blaisdell (1934) 290 U.S. 398, 431 [78 L. Ed. 413, 54 S. Ct. 231].) For instance, a law that discharged a debtor from liability was held invalid as applied to contracts in existence when the law was passed. (Ibid.)

The Legislature has applied the Davis-Stirling Common Interest Development Act (§ 1350 et seq.) "both prospectively and to existing documents." (2 Sproul & Rosenberry, supra, § 9.47, p. 693.) To any extent the reduction in the percentage of affirmative votes required to amend CC&R's may be said to substantially impair preexisting contract rights, there is no unconstitutionality because the statutes have a significant and legitimate public purpose and act by appropriate means. (Barrett v. Dawson, supra, 61 Cal.App.4th at p. 1055.) " '[A]s is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " (Hall v. Butte Home Health, Inc., supra, 60 Cal.App.4th at p. 322.)

Section 1356 is intended "to give a property owners' association the ability to amend its governing documents when, because of voter apathy or other reasons, important amendments cannot be approved by the normal procedures authorized by the declaration. [Citation.] In essence, it provides the association with a safety valve for those situations where the need for a supermajority vote would hamstring the association." (Blue Lagoon Community Assn. v. Mitchell, supra, 55 Cal.App.4th at p. 477.) Owners have a substantial interest in the long-term viability of a condominium project, and that interest is not served when a supermajority vote requirement and

voter disinterest combine to preclude or unduly hinder an association's efforts to amend outdated governing documents. (See Rest.3d Property, Servitude, § 6.12, com. a, p. 226.)

B

Additionally, Seith claims section 1356 is unconstitutional because it violates owners' procedural due process rights and equal protection rights. The record, however, does not show that Seith raised these issues at the trial court. "Typically, constitutional issues not raised in earlier civil proceedings are waived on appeal." (*Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1101 [53 Cal. Rptr. 3d 402].) We decline to reach the issues.

DISPOSITION

The order is affirmed. The Owners Association is entitled to costs on appeal.

Huffman, J., and Nares, J., concurred.

**KENNETH LIEBLER, Plaintiff and Appellant, v. POINT LOMA TENNIS CLUB,
Defendant and Respondent.**

No. DO19570.

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

40 Cal. App. 4th 1600; 47 Cal. Rptr. 2d 783; 1995 Cal. App. LEXIS 1220; 95 Cal. Daily
Op. Service 9573; 95 Daily Journal DAR 16541

December 13, 1995, Decided

PRIOR-HISTORY: Superior Court of San Diego County, No. 654750, Robert J. O'Neill,
Judge.

COUNSEL: Alan L. Williams for Plaintiff and Appellant.

Genson, Even, Crandall & Wade and Kurt A. Moll for Defendant and Respondent.

JUDGES: Opinion by Nares, J., with Work, Acting P. J., and Haller, J., concurring.

OPINION BY: NARES, J.

OPINION

NARES, J.

Kenneth Liebler (Liebler) appeals a judgment in favor of defendant Point Loma Tennis Club Community Corporation (PLTC), following a determination the PLTC declaration of covenants, conditions and restrictions did grant PLTC the authority to enact rules which exclude Liebler, a nonresident owner, from using the common area recreational facilities.

Liebler contends (1) the PLTC covenants, conditions and restrictions do not grant PLTC such a power of exclusion; (2) the rules and regulations which exclude nonresident owners from common area recreational facilities are unreasonable; and (3) the covenants, conditions and restrictions also do not grant PLTC the power to impose fines for violations. We affirm the judgment.

FACTS (1) and Procedure

FOOTNOTES

1 The facts are not in dispute, having largely been stipulated to before trial. The trial was conducted without a jury, and neither party raises any issue of fact on appeal.

Liebler purchased a condominium unit (2) in the Point Loma Tennis Club in June 1984. When Liebler purchased his unit, he received a copy of the recorded PLTC declaration of covenants, conditions and restrictions (CC&Rs) and the PLTC rules and regulations.

FOOTNOTES

2 For a description of "common interest" developments tracing the development of modern condominium ownership, see *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal. 4th 361, 370-375 [33 Cal. Rptr. 2d 63, 878 P.2d 1275].

The CC&Rs (1) establish ownership of a unit as the basis for holding a membership in the PLTC (§ 2.1) and (2) repeatedly set out the duty of the corporation to establish necessary rules for use and occupancy of the property (§ 3.2.9) and the common areas as well (§ 7.8.2).

Since 1977 (some seven years before Liebler acquired his unit), the PLTC rules have specifically excluded nonresident owners from use of the common area recreational facilities. In addition, the CC&Rs contain a covenant specifically prohibiting the severance and separate conveyance of an owner's interest in his unit from his undivided interest in the common area. Liebler never lived in the unit, but leased it to his daughter and then to a succession of tenants.

At the time Liebler purchased his unit, he and his daughter registered and obtained identification cards for use of the PLTC recreational facilities. After Liebler's daughter moved out and Liebler rented the unit to others, he continued to use the recreational facilities, in particular, the tennis courts. The Sullivans, Liebler's tenants at the time of the lawsuit, also used the recreational facilities.

Shortly after Liebler leased his unit to the Sullivans, he amended the lease agreement to include a statement that "Both parties confirm that for all purposes, the tenant and landlord share the premises as cotenants." No evidence was introduced showing Liebler ever occupied the unit or shared it with the Sullivans in any way other than by continuing to use the common area recreational facilities.

Early in 1992, some homeowners asked the board of directors of the PLTC homeowners association (Board) to look into use of the tennis courts by nonresidents and others who "did not belong there." In April a list was compiled of owners who held identification cards but whose addresses indicated they were not residents of PLTC. The Board then sent a letter to each of these nonresident owners asking for the return of their cards, reminding them of the rule requiring assignment of the use of the facilities to their tenants, and advising them that nonresident owners who continued to use the facilities would be asked to leave or fined.

All the nonresident owners except Liebler complied, either by returning their cards or, in some cases, reporting the cards as lost. Liebler responded with a hostile letter informing the Board he was a "registered resident" of his unit by the terms of his lease and he considered himself entitled to the privileges of a tenant as well as those of an owner. Liebler did not, however, provide the Board with a copy of the lease. Liebler later testified he did not live in the unit at the time he advised the Board that he was a "registered resident." Liebler continued to use the PLTC tennis courts at will.

On May 12, 1992, the Board sent Liebler a notice of violation in an attempt to enforce the rule against use of the recreational facilities by nonresident owners. Liebler appeared before the PLTC grievance committee for a hearing on June 16, 1992. At the hearing, Liebler continued to insist he was entitled to use the recreational facilities based on the wording of his lease, but refused the committee's request to view the lease itself.

After Liebler spoke to the committee, it considered the matter and recommended Liebler be fined \$ 150 for past violations and be notified that future violations of the

nonresident rule would incur additional fines. Liebler continued to use the facilities. PLTC continued to fine Liebler. Liebler has never paid any fines and PLTC has not taken legal action to attempt to collect them.

Liebler sued PLTC, seeking declaratory relief from the fines, and enforcement of equitable servitude by issuance of a temporary restraining order, and temporary and permanent injunctions against enforcement of the nonresident rule. Liebler also alleged breach of the covenant of enjoyment by PLTC, due to interference with Liebler's claimed property right in the easement of enjoyment of the common recreational facilities.

After trial, the court determined the PLTC CC&Rs granted the Board the authority to create a rule excluding nonresident owners from use of the common recreational facilities. The court found the nonresident rule as enacted was reasonable and it had been reasonably enforced. The court made a partial ruling on the fines issue, finding the PLTC had the authority to impose fines on a member of the association, but declining to decide whether the fines were legally enforceable until an attempt was made to collect. Judgment was entered for PLTC.

STANDARD OF REVIEW

Liebler claims the CC&Rs do not provide for the rule excluding nonresident owners from use of the common areas, and also attacks the reasonableness of the rule in question. It is clear that provisions restricting use and occupancy in recorded covenants governing a condominium project are "presumed to be reasonable and will be enforced uniformly against all residents of the common interest development unless the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction's benefits to the development's residents, or violates a fundamental public policy." (*Nahrstedt v. Lakeside Village Condominium Assn.*, supra, 8 Cal. 4th at p. 386, italics in original.) Rules made pursuant to recorded use restrictions are evaluated for their reasonableness in light of the interests of the residents as a whole, rather than the individual interests of a particular homeowner. (Ibid.)

DISCUSSION

I. Exclusion of Nonresident Owners From Common Areas

Liebler argues the provisions of article 8 of the PLTC CC&Rs create an easement of enjoyment in the common area to the benefit of a unit owner which cannot be abrogated by rules later adopted by the board of directors. Liebler points to specific portions of article 8 which provide:

"8. Members Easements of Enjoyment in the Common Area:

"The owners shall have the right and easement of enjoyment in and to the Common Area and such right and easement shall be appurtenant to and shall pass with the title to every assessed residential condominium subject to the following provisions:

"8.1 The right of the Corporation to limit the number of guests of members.

"8.2 The right of the Corporation to establish uniform rules and regulations pertaining to the use of the Common Area and the recreational facilities thereon.

"

"8.7 Any Member may delegate in accordance with the By-Laws, his right of enjoyment to the Common Area and facilities to the members of his family, his tenants or contract purchasers who reside on the Property."

The rule to which Liebler objects is found in the rules and regulations of the PLTC as follows: 3

FOOTNOTES

3 Although this rule was adopted in 1992, both parties agree a rule excluding nonresident owners from use of the recreational facilities has existed since at least 1977, predating Liebler's ownership in PLTC by at least seven years.

"IV. Recreational Area

"4.2 Use: The recreational facilities shall be used only by residents of PLTC and their guests. The right to use the facilities is appurtenant to the individual condominium unit and can not be separated from it (CC&R Section 8). Nonresident owners, whose units are rented or available for rent, do not have the use of the recreational facilities."

Liebler's argument is that by virtue of ownership, he gains an easement of enjoyment in the common area which he may continue to exercise until he transfers the actual title of the unit to a subsequent owner. He insists he is entitled to continue to use the common area so long as he owns the unit, and in addition, he may allow his tenants to also use the common area recreational facilities. He argues his right as an owner cannot be abridged by a rule that excludes nonresident owners from enjoyment of the recreational facilities.

Liebler relies primarily upon *MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal. App. 4th 618, 625-626 [9 Cal. Rptr. 2d 237], which held that a similar rule impermissibly created two categories of members, terminating a right "originally granted by the CC&Rs to all members whether resident or not." Although the present case also involves a dispute over use of tennis courts, there are significant legal and factual differences between the two. *MaJor* involved a completely physically disabled tenant who was an immediate family member of the owners, themselves former occupants, and the rule in question not only was promulgated long after their purchase, but appeared to have specifically singled out and targeted the owners for disparate treatment. (*Id.* at 621-622.)

The *MaJor* court itself noted the limits of its decision, which did not reach delegation of the right of enjoyment to a third party (*MaJor v. Miraverde Homeowners Assn.*, *supra*, 7 Cal. App. 4th at p. 626, fn. 1), or to the situation where, as here, a nonresident owner sought use of the tennis court both for himself and for a tenant. (*Id.* at p. 628, fn. 2.)

A further and central point distinguishing this case from *MaJor*, however, is the presence in the PLTC CC&Rs of a covenant specifically prohibiting severance and separate conveyance of an owner's component interests in the private and common use areas. *MaJor* is silent as to whether the CC&Rs there contained such a provision, and the *MaJor* court never discussed and appears not to have contemplated the effect such a provision would have when read together with the rest of the CC&Rs. Here, however, the PLTC CC&R article 12.2 contains the following covenant:

"12. Covenants Against Partition and Severability of Component Interest:

"12.2 No Owner shall be entitled to sever his Unit from his related undivided interest to the Common Area for any purpose, and no component interest may be severally sold, conveyed, encumbered or hypothecated. Any violation or attempted violation of this provision shall be void and of no effect"

The plain meaning of CC&R article 12.2 is that the exclusive use area (the unit) and the undivided interest in the common area are a unitary interest for conveyance purposes,

and one may not be conveyed without the other. As noted by the court below, the most obvious way to attempt severability would be for an owner to attempt to convey his interest in the common area to a third party who would not otherwise have rights of access.

A less obvious but equally prohibited severance would occur if an owner attempted to convey the unit, but reserve the right of common area access to himself, thus denying the purchaser or lessee the use of the common area. What Liebler attempted was a variant on this form of separate conveyance.

The amendment to Liebler's lease declaring that landlord and tenants shared the premises as cotenants, when there was no family or prior relationship with the lessees and no evidence Liebler ever shared the unit with them, can only have been an attempt to reserve to himself access to the common area while conveying a leasehold estate in the unit. This is contrary to CC&R article 12.2's prohibition against separate conveyance.

When CC&R article 12.2 is read together with article 8.7, which declares members may delegate their rights of enjoyment to the common area to their tenants "who reside on the property," it becomes clear the intent of the CC&R provisions is to have one set of users per unit: either the owner or the tenant, but not both. There is no mention of delegating common area rights and contemporaneously retaining them. Because under article 12.2 access to the common area cannot be severed from the unit, a conveyance of the unit to a tenant necessarily suspends the owner's access to the common area for the length of the tenancy. 4

FOOTNOTES

4 We also observe that Civil Code section 1362 provides in any event that "[u]nless the declaration otherwise provides, in a condominium project, or in a planned development in which the common areas are owned by the owners of the separate interests, the common areas are owned as tenants in common, in equal shares, one for each unit or lot." (Italics added.) Necessarily, if the common areas are owned in shares of "one for each unit," it is not logically possible (even absent the covenant to the contrary herein) to convey a lease in the unit together with the interest in the common areas, while also retaining the latter separately.

Thus, unlike *MaJor*, where the rule against nonresident owners was held ultra vires to the board's authority, here PLTC rule 4.2 is simply a clear statement of the effect of CC&R article 12.2, read together with CC&R article 8.7. None of Liebler's rights have been extinguished or terminated, and at such time as he ceases leasing the unit and himself becomes a resident he will regain full access to the common area recreational facilities.

As explained in *Nahrstedt v. Lakeside Village Condominium Association*, supra, 8 Cal. 4th at page 372, "Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement. [Citation]." The *Nahrstedt* court said further: "The restrictions on the use of property in any common interest development may limit activities conducted in the common areas as well as in the confines of the home itself. [Citations.]

". . . Ordinarily . . . ownership also entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project. [Citations.]

Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy. [Citation.]" (8 Cal. 4th at pp. 373-374.)

Nahrstedt makes clear that restrictions contained in the recorded CC&Rs will be accorded a presumption of validity. (Nahrstedt v. Lakeside Village Condominium Assn., supra, 8 Cal. 4th at p. 383.) In this case, the challenged rule is clearly within the contemplation of the relevant presumptively valid provisions of sections 8 and 12 of the CC&Rs, as well as sections 3.2.9 and 7.8.2. Because we hold the challenged rule is a proper implementation of the relevant sections of the CC&Rs, Liebler's argument that the rule is not permitted by the CC&Rs must fail.

II. Reasonableness

The next argument raised by Liebler is that the rule which he challenges is not reasonable, and for this reason may not be enforced against him. The ability to enforce use restrictions is not, of course, absolute. California Civil Code section 1354, subdivision (a) provides: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable" The Nahrstedt court defined unreasonable as those restrictions which "are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit." (Nahrstedt v. Lakeside Village Condominium Assn., supra, 8 Cal. 4th at p. 382.)

In addition, enforcement of the restriction must be in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied. (Nahrstedt v. Lakeside Village Condominium Assn., supra, 8 Cal. 4th at p. 383.) The framework of reference, as the court made clear, is not the reasonableness specific to the objecting homeowner, but reasonableness as to the common interest development as a whole. (Id. at p. 386.) Thus, restrictions recorded in the declaration (here, the CC&Rs) are presumptively reasonable, and so long as uniformly applied, will be enforced by the courts unless they fall into one of the three categories of "unreasonable" restrictions. (Ibid.)

In this case Liebler's claim that exclusion of nonresident owners from the common recreational facilities is unreasonable must fail, since the evidence received below demonstrates (a) the restriction was reasonable in itself from the perspective of the development as a whole, rather than that of Liebler, and (b) this reasonable restriction was also neither arbitrarily nor unfairly applied, but was instead applied evenhandedly.

A. The Restriction Itself Is Reasonable.

Viewed from the perspective of this particular common interest development as a whole, there is no indication that the restriction is arbitrary. ⁵ To the contrary, as noted by the court below, there are valid reasons why members of a tennis-oriented residential condominium might choose to restrict access to their private tennis courts, since maintaining a low density ensures the courts will be available to residents, families and guests.

FOOTNOTES

⁵ Liebler argued below that the reasonableness of the rule was to be tested from his own perspective, citing Bernardo Villas Management Corp. v. Black (1987) 190 Cal. App. 3d 153 [235 Cal. Rptr. 509] and Portola Hills Community Assn. v. James (1992) 4 Cal. App. 4th 289 [5 Cal. Rptr. 2d 580]. These cases have been disapproved in Nahrstedt v. Lakeside Village Condominium Assn., supra, 8 Cal. 4th at pages 385-386,

requiring instead the focus be on "the restriction's effect on the project as a whole, not on the individual homeowner." (Id. at p. 386.)

The number of tennis courts constructed in any particular development is likely determined during the design phase based on the proposed number of occupants, extrapolated from the number of units in the condominium. The added burden from use by nonresident owners in addition to tenants and owner-residents could potentially greatly increase the number of individuals competing for court space, and this decrease in availability lessens the attractiveness of a tennis-oriented facility.

We are unable to discern any issue of fundamental public policy in the action of a private association which determines to limit access to the available tennis courts to only those members actually in residence, when no restrictions whatsoever are placed on who may choose to reside in the condominium. Any owner may choose to reside on the premises, and thus have complete access to the common area recreational facility. 6

FOOTNOTES

6 Liebler's amended lease agreement declaring that he and his tenants "share the premises as cotenants" is ineffectual in light of the admitted fact Liebler does not reside on the premises.

Finally, viewed from the context of the common interest development as a whole, the burden on the individual owner is most certainly not disproportionate to the benefit to the whole. Presumably, a large factor in the decision of a prospective owner or tenant to move into a tennis-oriented facility is ready access to private courts. Maintaining a low density by excluding the public, and here, in long-standing restrictions, nonresident owners as well, confers a benefit on the residents for which many will pay a higher price. Thus Liebler himself has benefited from the restriction, since he is presumably thereby able to negotiate from his tenants a higher rent than he otherwise would have been able to obtain for the premises.

B. The Restriction Has Been Fairly Applied.

Liebler argued the restriction was unfairly and arbitrarily applied, and he had been singled out for exclusion in some sort of personal vendetta. Yet despite a full and fair hearing below, no evidence supported his allegations. The facts and documents stipulated to before trial, and later supported by uncontroverted testimony, indicate that after nonspecific complaints from residents to the Board about nonresidents using the facilities in contravention of the rules, the initial steps toward enforcement were directed at all nonresident owners who were using or potentially using the recreational facilities. First, a list was compiled of owners with identification cards for use of the recreational facilities whose addresses were not in the confines of PLTC. Then, a form letter was sent to each asking for the return of the cards. With the single exception of Liebler, all nonresident owners complied with the request.

Liebler chose to respond with a letter that can at best be described as hostile. He continued to use the facilities whenever he wished, even after he was no longer in possession of his identification card, and went on using them at least until the date of trial. Faced with such flagrant disregard for its authority, the Board ultimately chose to fine Liebler for his repeated violations. 7

FOOTNOTES

7 We do not here decide the separate question of whether such fines are legally enforceable. See part III, post.

Before fining Liebler, PLTC provided him notice and an opportunity for a hearing. He addressed the grievance committee in person. Although the Board continued to fine Liebler as he continued to violate the restriction, no attempt was made to collect the fines, and Liebler has suffered no out-of-pocket damages. Despite Liebler's allegations of unfairness no evidence was introduced, even in his own testimony, that would show an attempt at selective enforcement.

Since the restriction has been both reasonably and evenly enforced against all to whom it applies, and the enforcement procedures have been fair, including advance written notice, compliance with a previously published and distributed schedule of fines, according Liebler the opportunity to be heard by the grievance committee before proceeding with fines, and since no evidence was introduced of selective enforcement, Liebler's assertion of unreasonable enforcement must fail.

III. Authority to Impose Fines

Liebler last contends that, absent an express provision in the PLTC CC&Rs authorizing such, the Board lacks the authority to subject him to fines. CC&R article 3.2.9 states the corporation may "[e]stablish and publish such rules and regulations as the Board may deem reasonable in connection with the use, occupancy and maintenance of all of the Property" PLTC rule 5.2 provides in part that "[e]nforcement shall be carried out in a fair and timely manner by means of fines . . . and other legal action as appropriate." Section VI of the PLTC rules is a schedule of fines, providing that for "Misuse of the common area" the fine will be \$ 50. Liebler received copies of the PLTC rules when he purchased his condominium unit. For the reasons which follow, we reject Liebler's assertion these provisions cannot support the imposition of fines upon him.

As noted in part I, ante, our Supreme Court in *Nahrstedt v. Lakeside Village Condominium Assn.*, supra, 8 Cal. 4th at page 373, stated that one of the characteristics of condominium ownership is "mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project."

While cautioning against abuses of such regulatory power (*Nahrstedt v. Lakeside Village Condominium Assn.*, supra, 8 Cal. 4th at pp. 373-374), the *Nahrstedt* court (as we have cited in part I, ante) went on to observe: "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy. [Citation.]" (8 Cal. 4th at p. 374, italics added.)

Civil Code section 1363, subdivision (i) provides in pertinent part that "[i]f an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents or rules of the association . . . the board of directors shall adopt and distribute to each member . . . a schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with authorization for member discipline contained in the governing documents."

Because the PLTC governing documents establishing the right to fine offending association members comply with the cited code section, and because the authorization for the challenged rules is itself contained in the recorded PLTC CC&Rs, Liebler is incorrect in asserting such fines are unauthorized. The trial court correctly found PLTC had the power to impose fines upon Liebler for his violations of PLTC rules, although

that court did not address the question of the means by which such fines might be collected. 8

FOOTNOTES

8 We also need not here reach the question of the means by which such fines may be collected, as there is at present no actual case or controversy concerning this matter. Both sides agree no attempt has been made to collect the fines, and absent such collection efforts, a determination in the abstract of the manner in which PLTC might collect such fines would constitute an advisory opinion. "The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." (People ex rel. Lynch v. Superior Court (1970) 1 Cal. 3d 910, 912 [83 Cal. Rptr. 670, 464 P.2d 126].)" (Salazar v. Eastin (1995) 9 Cal. 4th 836, 860 [39 Cal. Rptr. 2d 21, 890 P.2d 43].) That holding applies here.

CONCLUSION

The judgment is affirmed. Respondents to recover costs on appeal.

Work, Acting P. J., and Haller, J., concurred.

A petition for a rehearing was denied January 8, 1996, and appellant's petition for review by the Supreme Court was denied February 29, 1996.

Court of Appeal, Fourth District, Division 2, California.
Steven NELSON, Plaintiff and Appellant,
v.
AVONDALE HOA, Defendant and Respondent.

No. E044045.
Feb. 27, 2009.

Veronica M. Aguilar, San Diego, for Plaintiff and Appellant. Hollins • Schechter, Tamara M. Heathcote, and Jeffrey R. Gillette, Santa Ana, for Defendant and Respondent.

OPINION

RAMIREZ, P.J.

*I Plaintiff and appellant Steven Nelson (Nelson) challenges the trial court ruling denying Nelson's motion for a preliminary injunction. Nelson sought the injunction to stop defendant and respondent Avondale Homeowners Association (HOA) from preventing Nelson's "visitors/guests/religious affiliates and patients from entering the gates at Avondale HOA" pending the resolution of Nelson's complaint for causes of action including discrimination and declaratory relief. As discussed below, we find no merit to Nelson's arguments and so affirm the trial court ruling.

STATEMENT OF FACTS AND PROCEDURE

On June 20, 2007, after receiving a "right to sue" letter from the Department of Fair Employment and Housing, Nelson filed a complaint with the superior court, naming the HOA as defendant. The complaint alleged that Nelson is a "world renowned Homeopathic Nutritionist and religious counselor" with a doctorate in pharmacology and a doctor of clinical religious counseling. Nelson maintained his practice in an office in Palm Desert. Nelson's wife died in 2004. In 2006, the complaint alleged, Nelson became ill with Epstein Barr virus and hypothyroidism with concomitant adrenal exhaustion. One effect of the illness was bouts of dizziness. The complaint alleged that Nelson was restricted from driving and "from essentially leaving his home."

At some point, Nelson relocated his religious and medical counseling practice to his home. Nelson would see up to eight individual patients a day for one-half hour at a time, five days a week. The complaint alleged that Nelson did not sell products or bill the patients from his home. The complaint further alleged that Nelson was not operating a " 'Home Business' " according to the rules and regulations of the HOA, and he asserted that the HOA was violating his rights under the California Fair Employment and Practices Act (FEPA), as well as the United States and California Constitutions by preventing Nelson's visitors from entering the HOA grounds. The complaint alleged five causes of action: (1) disability discrimination under the FEPA; (2) religious discrimination under the FEPA; (3) breach of contract; (4) intentional infliction of emotional distress; and (5) declaratory relief.

On June 22, 2007, Nelson filed a motion for preliminary injunction. In his supporting declaration, Nelson declared that, beginning around May 12, 2007, the HOA "prevented anyone who was coming to visit or consult with me for religious or nutritional purposes from coming into the Avondale gate" after concluding that Nelson was running a home business in violation of the HOA's rules and regulations. Nelson declared that the HOA's actions were costing him \$5,000 a day.

On July 16, 2007, the HOA filed its opposition to Nelson's motion for preliminary injunction. In a declaration in support of the opposition, Mell Kilpatrick, a member of the HOA board of directors, declared that Nelson had been running a business from his home since December 2005. He also

declared that Nelson had approximately 1,060 visitors and vendors travel in and out of the HOA gates from December 2005 to December 2006, and that Kilpatrick had personally witnessed people leaving Nelson's home carrying small packages. Kilpatrick outlined the steps taken by the HOA, beginning with a petition signed by 15 ^{FN1} of Nelson's neighbors, presented to the HOA board of directors, stating that Nelson was selling products from his home and asking that the sales be stopped. On March 29, 2007, the HOA sent Nelson a violation notice advising him of complaints that he was running a business out of his home in violation of the HOA's rules and regulations. On April 11, 2007, the HOA sent Nelson a letter informing him of a hearing before the HOA board of directors on April 24, 2007, regarding this matter. On April 22, 2007, Nelson wrote a response to the violation letter explaining the situation with his illness and his business, and asking that he be allowed to proceed for an additional six to twelve months until he recovered. Nelson also stated he was medically unable to appear at the hearing.

*2 The HOA board of directors held the hearing on April 24, 2007, and on April 27, 2007, sent Nelson a letter informing him of its three-part ruling. First, the board imposed a \$200 enforcement assessment. Second, the board revoked all guest passes ("except for vendors such as landscapers, pool cleaners, housekeepers, etc.") until Nelson provided a new permanent guest list of family and friends, stating that "Entry will be denied to those persons seeking to purchase goods and services from your home." Third, the board stated that, once Nelson paid the enforcement assessment and provided a new permanent guest list, the HOA would "provide a reasonable accommodation to permit increased pickups and deliveries ... so that you can service your customers by mail" until Nelson could reopen his office.

Nelson filed his reply to the HOA's opposition to his motion for preliminary injunction on July 20, 1997. In support of the opposition, Nelson attached the declaration of Sharon Morgan. Morgan declared that she was an employee at Nelson's business office and that all billing, administrative work and product sales were handled from the business office. Morgan also declared that she had lived with Nelson since December 2006 and that Nelson required a significant amount of rest because of his illness and "can rarely leave his home."

Nelson's motion was heard on July 27, 2007. The trial court denied the motion, concluding that Nelson had admitted that he was seeing patients at his home, and that constituted a home business. The court also concluded that the HOA was not discriminating against Nelson based on his religion or disability. At the end of the hearing, the HOA asked the court to grant its ex parte application for issuance of an order to show cause for a preliminary injunction against the operation of Nelson's home-based business. The court granted the order to show cause and set the hearing for August 31, 2007. This appeal followed on August 15, 2007.

DISCUSSION

"In determining whether to issue a preliminary injunction, the trial court considers two related factors: (1) the likelihood that the plaintiff will prevail on the merits of its case at trial, and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. [Citation.] ... [¶] The determination whether to grant a preliminary injunction generally rests in the sound discretion of the trial court. [Citation.] 'Discretion is abused when a court exceeds the bounds of reason or contravenes uncontradicted evidence. [Citation.] [Citation.] [¶] ... [¶] We reverse an order denying a preliminary injunction only if the trial court has abused its discretion in ruling on *both* factors. [Citation.]" (14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal.App.4th 1396, 1402-1403, 74 Cal.Rptr.2d 712, italics added.)

*3 Nelson's arguments on appeal as to the likelihood that he will prevail on the merits of the case at trial are for the most part easily dispatched. This is in part because they are without merit, and in part because they are not well made according to the established standards of appellate practice.

First, Nelson argues that the California Fair Employment and Housing Act (FEHA) prohibits discrimination in all aspects of housing based on disability, medical condition and religion. He further states that the HOA was on notice of his disability through his letter dated April 22, 2007, but refused to meaningfully accommodate him. Not to mention that Nelson received a "right to sue" letter from the Department of Fair Employment and Housing. A discussion of the legal authorities establishing that the HOA was required to accommodate Nelson, and specifying what the HOA was required to do, would have been helpful here, along with some demonstration that the HOA is a covered entity and its actions here are reviewable under the FEHA. Absent this, we decline to address the issue. (See *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856, 85 Cal.Rptr.2d 521.)

Second, Nelson argues that the Unruh Civil Rights Act (Civil Code § 51) prohibits discrimination regarding disability, medical condition, and religion, and that the HOA is a " 'business establishment' " within the meaning of this provision. This may be a true statement of the law, but it is not a cogent legal argument, with relevant citations to the record, establishing that the trial court abused its discretion when it found Nelson had not established a probability of success on the merits, at least as to whether the HOA violated the Unruh Civil Rights Act. We also likewise decline to address this issue.

Third, Nelson argues that, under Civil Code section 53, which prohibits restrictive covenants on the use of property based on disability or religion, the HOA's rules and regulations are void and unenforceable because they have a disparate impact on Nelson and his guests. Appellate briefs must provide argument and legal authority for the positions taken. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785, 79 Cal.Rptr.2d 273.) Again, Nelson has failed to provide more than a brief recitation of his argument on this issue, and so we decline to address it.

Fourth, Nelson argues that the HOA's failure to enforce its rules and regulations from December 2005 to April 2007 constitutes a waiver. Again, Nelson makes only this blanket statement, with no citation to authority or discussion of the authority as it applies to the facts of this case, and so this point is waived.

Fifth, Nelson argues he is not engaged in a " 'home business' " under the rules and regulations, and thus the HOA acted "arbitrarily and capriciously" when it fined him and restricted his visitors to those on his permanent guest list, even after Nelson "placed Respondents on notice of his disability and religious practices." We disagree. As the trial court stated in its minute order denying the preliminary injunction, Nelson has admitted that he runs a business out of his home. In his letter to the HOA on April 22, 2007, Nelson stated "The continuity of my business and my livelihood are at stake. Thus, I respectfully request that I be allowed to continue to work from my home...." Nelson alleged in his complaint that he would see up to eight people for "religious and medical counseling" a day, five days per week, which was the same practice in which he was engaged at his business office. Nelson also alleged in his declaration in support of the motion for preliminary injunction that he loses \$5,000 a day when he is not seeing patients. In addition, Nelson's business violated section 7(a)(4) of the rules and regulations ["Pedestrian and vehicular traffic will be limited to that normally associated with residential districts"] in that he admitted he had up to eight visitors a day, five times a week. Finally, in violation of section 7(a) of the rules and regulations ["The conduct of a home occupation requires both the approval of the City of Palm Desert and the approval of the Association"], Nelson did not seek permission from either the City of Palm Desert or the HOA until after he received the notice of violation in April 2007. Thus, the trial court did not abuse its discretion when it determined that Nelson could not establish a probability of success on the merits because he was running a home business in direct violation of the rules and regulations.

*4 Sixth, Nelson argues that the HOA illegally has refused to provide him with a "meaningful reasonable accommodation" under the Federal Fair Housing Amendments Act. (42 U.S.C.S. § 3601 et seq.) We could find no reference to this federal housing non-discrimination law in Nelson's written or oral arguments below. Because Nelson did not make this argument in the trial court, it is waived on appeal. (See *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1, 151 Cal.Rptr. 837, 588 P.2d 1261.)

The trial court did not abuse its discretion when it determined that Nelson had not established a probability of success on the merits. Further, we need not consider Nelson's arguments on the potential for irreparable injury because, as set forth above, an appellant seeking reversal of an order denying a preliminary injunction must establish that the trial court has abused its discretion in ruling on both factors. For these reasons, we conclude that Nelson has not carried his burden to establish that the trial court abused its discretion when it denied his motion for preliminary injunction.

DISPOSITION

The trial court's ruling denying Nelson's motion for preliminary injunction is affirmed. The HOA shall recover from Nelson its costs on appeal.

We concur: GAUT and MILLER, JJ.

FN1. Listed on the petition are 19 individuals from 15 addresses.

COLONY HILL, Plaintiff and Respondent, v. MASOOD GHAMATY, Defendant and Appellant.

D046702

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

143 Cal. App. 4th 1156; 50 Cal. Rptr. 3d 247; 2006 Cal. App. LEXIS 1566; 2006 Cal. Daily Op. Service 9610

September 15, 2006, Filed

NOTICE:

As modified Oct. 11, 2006.

PRIOR-HISTORY: Superior Court of San Diego County, No. GIC828735, Linda B. Quinn, Judge. Colony Hill v. Ghamaty, 142 Cal. App. 4th 1408 [48 Cal. Rptr. 3d 798, 2006 Cal. App. LEXIS 1391] (Cal. App. 4th Dist., 2006)

COUNSEL: Rutan & Tucker, Stephen A. Ellis and Gerard M. Mooney, Jr., for Defendant and Appellant.

Hecht Solberg Robinson Goldberg & Bagley, Jerold H. Goldberg and Joshua A. Sonné for Plaintiff and Respondent.

JUDGES: McConnell, P. J., with O'Rourke and Irion, JJ., concurring.

OPINION BY: McConnell

OPINION

McCONNELL, P. J.—Defendant Masood Ghamaty appeals a judgment for plaintiff Colony Hill on its declaratory relief action. Ghamaty contends the trial court erred by finding the serial rental of rooms in his condominium violated Colony Hill's restriction limiting the home's use to single-family dwelling purposes, and also contends the use restriction is unreasonable and may not be maintained. We affirm the judgment and discuss this issue in part 1 of this opinion.

Ghamaty also contends the court improperly granted Colony Hill contractual attorney fees under Civil Code section 1717. In part III of this opinion we dismiss the attorney fees issue for lack of jurisdiction because Ghamaty did not file a notice of appeal from the postjudgment order on the matter.

FACTUAL AND PROCEDURAL BACKGROUND

Colony Hill, a common interest subdivision located in the Mount Soledad area of La Jolla, California, consists of 40 condominiums, or "lots," owned by the residents. Colony Hill is managed by the board of governors (the Board) of the homeowners association. Colony Hill is governed by a declaration of covenants, conditions and restrictions (the Declaration), as amended in 1983. The two relevant paragraphs of the Declaration read as follows:

"2.6 Each Lot shall be improved, used and occupied for private, single-family dwelling purposes only, and no portion thereof nor any portion of the Common Area shall be used for any commercial purpose whatsoever." (Italics added.)

"2.7.8 Each Owner shall have the right to lease his [or her] Lot, provided the following conditions are satisfied: (a) each such lease shall be in writing and shall be submitted to the Board if

requested; (b) each lease shall provide that the tenant shall be bound by and obligated to the provisions of this Declaration, the Bylaws and the rules and regulations promulgated by the Board and shall further provide that any failure to comply with the provisions of such documents shall be a default under the lease; (c) the name of each person residing upon a Lot pursuant to any such lease shall be provided to the Board; and (d) no Owner shall lease his [or her] Lot for transient or hotel purposes."

In 2000 Ghamaty became an owner of a four-bedroom, three-bathroom home at Colony Hill. Ghamaty occupies the home himself, and he has also rented rooms to six persons at various times, for periods of between two months and two years. Ghamaty charged rents of between \$ 300 and \$ 550 per month, plus a share of the utilities. Each renter had the exclusive use of a bedroom and a bathroom, and the nonexclusive use of the living room and kitchen. The shortest-term renter was a cousin of Ghamaty's, but the other renters were unrelated to him. The rental agreements were oral and Ghamaty did not notify Colony of his tenants' names.

In early 2002 the Board notified Ghamaty it had learned he had one or more renters at his home in violation of the Declaration's requirement that it be used only as a single-family dwelling. The Board demanded that Ghamaty "return the property to a private single-family dwelling status immediately." Ghamaty disagreed with the Board, taking the position he could rent rooms to whomever he wished under paragraph 2.7.8 of the Declaration. The parties exchanged more correspondence on the matter to no avail.

In a May 2003 letter, the Board notified Ghamaty a resident had complained about a party at his residence, during which guests parked in no-parking areas and blocked driveways and loud music was played. The letter stated that if the Board received any additional complaints of excessive noise it would require "that all non-family members cease living at your house." In a July 2003 letter, the Board notified Ghamaty about some type of incident with one of his renter's cars. The letter reminded Ghamaty that homes were to be used for single-family purposes only and "suggest[ed] that you or your father sell the house and you move to a neighborhood where renters are allowed."

On July 17, 2003, Ghamaty appeared at a Board meeting. A resident voiced concerns about parking issues, renters and a loud party at Ghamaty's home. The resident complained that Ghamaty's renting out rooms was a commercial enterprise the Declaration does not allow. Ghamaty told the Board he had spoken with an attorney regarding the single-family residence language in the Declaration, and Ghamaty "considers his renters as family." The Board approved a motion finding that renting or leasing to multiple occupants constitutes a commercial enterprise not allowed under the Declaration.

The Board meeting did not resolve the matter, and in April 2004, after unsuccessfully seeking binding arbitration, Colony Hill sued Ghamaty for breach of the Declaration, injunctive relief and declaratory relief. A bench trial was held on February 25, 2005. In lieu of live testimony, the parties stipulated to certain facts and exhibits and submitted the matter for a tentative judgment before presenting closing arguments. In his trial brief, Ghamaty relied on the San Diego Municipal Code's definition of "family," which is "two or more persons related through blood, marriage, or legal adoption ... or unrelated persons who jointly occupy and have equal access to all areas of a dwelling unit and who function together as an integrated economic unit." (San Diego Mun. Code, § 113.0103.)

In its tentative ruling, the court found Ghamaty's rentals violated the Declaration. The court determined that under paragraphs 2.6 and 2.7.8 1 of the Declaration the "only commercial activity allowed is the right to lease a unit under specific conditions which [Ghamaty] failed to meet." The court relied on the San Diego Municipal Code definition that Ghamaty submitted, and determined that by renting rooms he was not using the home for single-family purposes. The court ruled that

under the municipal code definition, Ghamaty "may lease his entire unit to tenants who are responsible for the entire unit jointly and severally and who function as an integrated economic unit; i.e.,[.] one lease whereby all tenants are jointly and severally responsible for all obligations under the lease, including rent."

FOOTNOTES

1 The tentative ruling erroneously cites paragraph 2.7.9 of the Declaration.

The court explained that if Ghamaty's position were accepted, "one of the tenants may be violating the Rules and Regulations by emanating loud noise from his bedroom and [Colony Hill] could only enforce the rule against that individual person rather than all tenants of one unit. Other dwellers of the unit could claim no violation as they had no responsibility for the acts in the one bedroom. [Colony Hill] is not required to relate to each dweller as though [Ghamaty] were operating an apartment building within the unit." The ruling further states that Colony Hill "is entitled to a copy of a written lease whereby each occupier (competent adult) agrees under one lease document to follow the [Declaration], By-laws, and Rules and Regulations of [Colony Hill] jointly and severally as to the entire unit and common areas and it is entitled to the names of all the dwellers of the unit. [Colony Hill] is also entitled to one lease document under which all competent adult dwellers are an 'integrated economic unit[.]' i.e. jointly and severally liable for the lease payment for the unit."

After arguments, the court confirmed its tentative ruling and adopted it as a statement of decision. The court entered judgment for Colony Hill on April 18, 2005, which declared Ghamaty was in violation of paragraphs 2.6 and 2.7.8 2 of the Declaration, and permanently enjoins him "from renting his unit to multiple renters other than in compliance with the declaration of this Court."

FOOTNOTES

2 The judgment also erroneously cites paragraph 2.7.9 of the Declaration.

Colony Hill then moved as the prevailing party for \$ 29,987.50 in attorney fees, under paragraph 6.6 of the Declaration and section 1717 of the Civil Code, and \$ 1,729.60 in other costs. The court awarded the full amount requested.

DISCUSSION

I

Single-family Dwelling

Ghamaty cursorily contends that because he lives in his Colony Hill home and is "fully subject" to the Declaration's rules and regulations, the trial court erred by finding he was not using it for single-family dwelling purposes within the meaning of paragraph 2.6 of the Declaration. He asserts he did not violate the Declaration by merely engaging in the "incidental renting of rooms in his home to friends [he] considers to be like 'family.' "

Ghamaty cites no authority from any jurisdiction to support the notion that the seriatim renting of rooms in one's home constitutes single-family dwelling use. "Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (People v. Ham (1970) 7 Cal. App. 3d 768, 783 [86 Cal. Rptr. 906], disapproved on another ground in People v. Compton (1971) 6 Cal.3d 55, 60, fn. 3 [98 Cal. Rptr. 217, 490 P.2d 537]; see People v. Sierra (1995) 37 Cal.App.4th 1690, 1693, fn. 2 [44 Cal. Rptr. 2d 575].)

In any event, Ghamaty's contention lacks merit. The court used the definition of "family" that Ghamaty submitted for its consideration, which in relevant part is "unrelated persons who jointly occupy and have equal access to all areas of a dwelling unit and who function together as an integrated economic unit." (San Diego Mun. Code, § 113.0103, italics added.) The parties have not

cited us to any definition of "integrated economic unit" in the context of residential living arrangements, and we have found none in our independent research. Under the facts here, however, the term cannot reasonably be interpreted to include Ghamaty and his renters. Ghamaty adduced no evidence he had any prior relationship with five of six of the renters, or that any of the renters had any prior relationship with each other. Ghamaty conceded he found one of the renters by placing an ad in the newspaper. The renters all had separate oral month-to-month agreements and they lived at Ghamaty's home for various periods, with some of the renters not even present during the terms of other renters. One of the renters was a cousin of Ghamaty, but he lived at the home only sporadically for two months.

The term "integrate" means "to form, coordinate, or blend into a functioning or unified whole." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 650.) The mere payment of rent and a share of the utilities to Ghamaty did not blend the group into any type of unified whole. Beyond Ghamaty's self-serving statement at the Board meeting that he considered his renters "family," he produced no evidence suggesting he shared meals with or had any type of relationship with the renters, with the exception of the familial relationship with his cousin. The court properly ruled that by renting out rooms Ghamaty was not using his home for single-family dwelling purposes.

II Reasonableness of Use Restriction

A Applicable Law

Ghamaty's principal challenge is to the legality of the Declaration's restriction of use to single-family dwelling purposes. The matter is governed by the provisions of the Davis-Stirling Common Interest Development Act, which was enacted in 1985. (Civ. Code, § 1350.) Civil Code section 1354, subdivision (a) provides the "covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development." (Italics added.)

"Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement." (Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal.4th 361, 372 [33 Cal. Rptr. 2d 63, 878 P.2d 1275] (Nahrstedt).) "The restrictions on the use of property in any common interest development may limit activities conducted in the common areas as well as in the confines of the home itself. [Citations.] Commonly, use restrictions preclude alteration of building exteriors, limit the number of persons that can occupy each unit, and place limitations on—or prohibit altogether—the keeping of pets." (Id. at p. 373.)

In Nahrstedt, the court was required to determine what standard or test governs the enforceability of recorded equitable servitudes in common interest developments, a matter of legislative intent. (Nahrstedt, supra, 8 Cal.4th at pp. 375, 378-379.) The court held: "An equitable servitude will be enforced unless it violates public policy; it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced." (Id. at p. 382.)

The court also held that by using the term "unless unreasonable" in Civil Code section 1354, subdivision (a), the Legislature created a presumption of reasonableness and shifted the burden of proving otherwise to the party challenging the use restriction. (Nahrstedt, supra, 8 Cal.4th at p. 380.) Further, the court held "the reasonableness or unreasonableness of a condominium use restriction that the Legislature has made subject to [Civil Code] section 1354 is to be determined not by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole." (Nahrstedt, supra, 8 Cal.4th at p. 386.) 3

FOOTNOTES

3 In *Nahrstedt*, supra, 8 Cal.4th 361, the court concluded a use restriction that prohibited cats and dogs, but allowed domestic fish and birds, was reasonable. (Id. at p. 369, fn. 3, & p. 386.)

B

Ghamaty's Showing

1

To prevail, Ghamaty was required to prove the single-family dwelling use restriction is "arbitrary, that it is substantially more burdensome than beneficial to the affected properties, or that it violates a fundamental public policy." (*Nahrstedt*, supra, 8 Cal.4th at p. 386.) Further, he must do so in the context of Colony Hill as a whole. (Id. at p. 387.)

Ghamaty contends the permanent injunction violates his right of privacy under the California Constitution, article I, section 1. 4 "[A] land-use restriction in violation of a state constitutional provision presumably would conflict with public policy" (*Nahrstedt*, supra, 8 Cal.4th at p. 387), and the question is whether the right to privacy implicitly guarantees owners in a common interest development the right to rent out rooms in their homes under circumstances such as those here. (Ibid.)

FOOTNOTES

4 That provision states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

As the Supreme Court has held, "the privacy provision in our state Constitution does not 'encompass all conceivable assertions of individual rights' or create 'an unbridled right' of personal freedom. [Citation.] The legally recognized privacy interests that fall within the protection of the state Constitution are generally of two classes: (1) interests in precluding dissemination of confidential information ("informational privacy"); and (2) interests in making personal decisions or in conducting personal activities free of interference, observation, or intrusion ("autonomy privacy"). [Citation.] The threshold question in deciding whether 'established social norms safeguard a particular type of information or protect a personal decision from public or private intervention,' ... must be determined from 'the usual sources of positive law governing the right to privacy—common law development, constitutional development, statutory enactment, and the ballots arguments accompanying the Privacy Initiative.'" (*Nahrstedt*, supra, 8 Cal.4th at p. 387, citing *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35–36 [26 Cal. Rptr. 2d 834, 865 P.2d 633].)

Ghamaty relies on *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123 [164 Cal. Rptr. 539, 610 P.2d 436] (*Adamson*), and its progeny, *City of Chula Vista v. Pagard* (1981) 115 Cal. App. 3d 785 [171 Cal. Rptr. 738] (*Pagard*). Those cases, however, are inapplicable.

In *Adamson*, a city ordinance required that all occupants of a home be members of a family, and it defined family in relevant part as a group not to exceed five persons, excluding servants, "living together as a single housekeeping unit in a dwelling unit." (*Adamson*, supra, 27 Cal.3d at p. 127.) The appellant's household consisted of a group of 12 unrelated adults who lived in a 24-room, 10-bedroom, 6-bathroom home. The evidence showed the residents "have become a close group with social, economic, and psychological commitments to each other. They share expenses, rotate chores, and eat evening meals together. ... Emotional support and stability are provided by the members to each other; they enjoy recreational activities such as a trip to Mexico together; they have chosen to live together mainly because of their compatibility." (Id. at pp. 127–128.)

In *Adamson*, the court held the city lacked a compelling public interest in restricting communal living to groups of five or fewer persons. The court found the ordinance's "rule-of-five" did not

promote the stated goals of " 'serv[ing] the public health, safety, comfort, convenience and general welfare and ... provid[ing] the economic and social advantages resulting from an orderly planned use of land resources, and ... encourag[ing], guid[ing] and provid[ing] a definite plan for future growth and development' " of the city, or prohibiting activities of a commercial nature and developing and sustaining a suitable environment " 'for family life where children are members of most families.' " (Adamson, supra, 27 Cal.3d at pp. 131-132.)

The court noted the "rule-of-five is not pertinent to noise, traffic or parking congestion, kinds of activity, or other conditions that conceivably might alter the land-use-related 'characteristics' or 'environment' " of the city. (Adamson, supra, 27 Cal.3d at pp. 132-133.) The court found the city's stated goals could be satisfied by less restrictive means, such as regulating population density based on floor space and facilities, regulating noise by enforcing ordinances and criminal statutes, and regulating traffic and parking by limiting the number of cars permitted a household and by offstreet parking requirements. (Adamson, supra, 27 Cal.3d at p. 133.)

In Pagard, supra, 115 Cal. App. 3d 785, a city ordinance prohibited more than three unrelated persons from living together. At issue there were several communal households that were occupied by between four and 24 unrelated persons. (Id. at p. 791.) This court, in accordance with Adamson, held the ordinance was invalid as it had "but at most a tenuous relationship to the alleviation of the problems mentioned," such as overcrowding, minimizing traffic and congestion and avoiding undue financial burden on the school system. (Id. at p. 793.)

Adamson and Pagard, however, involved governmental action, in contrast to this case. In Schmidt v. Superior Court (1989) 48 Cal.3d 370 [256 Cal. Rptr. 750, 769 P.2d 932] (Schmidt), the court upheld the constitutionality of a mobilehome park owner's rule that excluded persons under the age of 25 from residing in the park. The court rejected the plaintiffs' argument, based on Adamson, supra, 27 Cal.3d 123, that the rule violated their right of privacy. The court explained the restriction in Adamson "was a state-imposed rule directly limiting an individual's right to live with whom he or she wanted; in [that] case, a governmental body had made the substantive decision to limit individual living arrangements within a community." (Schmidt, supra, 48 Cal.3d at p. 388.) Further, the court explained a park owner's authority to adopt an age-based housing rule "arises from its general common law property rights in the mobilehome park Nothing in Adamson ... suggests that constitutional guarantees are violated by the enactment of a statute which simply recognizes the continuing existence of a private property owner's authority in this respect." (Ibid.) 5

FOOTNOTES

5 In Schmidt, Civil Code former section 798.76 was at issue. It provided that the " 'management [of a mobilehome park] may require that a purchaser of a mobilehome which will remain in the park, comply with any rule or regulation limiting residence to adults only.' " (Schmidt, supra, 48 Cal.3d at p. 379.)

Indeed, Ghamaty states in his opening brief that the "clear rule is ... that the State may not utilize its power to interfere with a person's choice of cohabitants, absent some compelling public interest or reasonable necessity for doing so." (Italics added.) Ghamaty cites no authority for the proposition that a private developer may not impose on its project use restrictions such as those in paragraphs 2.6 and 2.7.8 of the Declaration. "A decision is authority only for the point actually passed on by the court and directly involved in the case. General expressions in opinions that go beyond the facts of the case will not necessarily control the outcome in a subsequent suit involving different facts." (Gomes v. County of Mendocino (1995) 37 Cal.App.4th 977, 985 [44 Cal. Rptr. 2d 93]; see Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (1999) 19 Cal.4th 1182, 1195 [81 Cal. Rptr. 2d 521, 969 P.2d 613].)

Moreover, Adamson and Pagard pertained to the number of unrelated persons allowed to reside together. In Adamson, the evidence showed the residents were committed to each other and engaged in communal living by sharing expenses, chores, meals and travel. (Adamson, supra, 27 Cal.3d at pp. 127-128.) The court found the city's ordinance defining "family" as including only five or fewer related persons living as " 'a single housekeeping unit in a dwelling' " (id. at p. 127) violated the plaintiffs' right to live together as an "alternate family" because of the numerical limitation. (Id. at pp. 128, 134.)

Similarly, in Pagard, the unrelated persons lived in "religious family households" or "communal households." (Pagard, supra, 115 Cal. App. 3d at pp. 787, 788.) The city's definition of family included " 'a group of not more than three persons ... who need not be related, living in a dwelling unit as a single housekeeping unit and using common cooking facilities.' " (Id. at p. 789.) The families lived in single housekeeping units, and this court struck down the ordinance because of the numerical limitation. (Id. at p. 793.)

In contrast, the injunction here includes no numerical limitation. Rather, it precludes Ghamaty from using his home for purposes other than a single-family dwelling, and in determining the meaning of "family," the court used the definition Ghamaty submitted. Again, that definition is "unrelated persons who jointly occupy and have equal access to all areas of a dwelling unit and who function together as an integrated economic unit." (San Diego Mun. Code, § 113.0103, italics added.) As discussed, Ghamaty presented no evidence he and his various renters functioned together as an integrated economic unit. The injunction's requirements that Ghamaty may enter into only one lease of his property at a time, and that lessees shall be jointly and severally liable for the lease payment, are reasonably intended to ensure the lessees are an "integrated economic unit." The court employed practical means to preclude the serial renting of rooms, which, when considered on a larger scale, could destroy the single-family character of Colony Hill.

Ghamaty asserts the injunction "impermissibly speaks to the relationship between the residents of [his] home, rather than to the use of the [r]esidence itself." (Original underscoring.) In both Adamson and Pagard, however, the residents had relationships with each other and they satisfied the ordinances' requirements that they constitute single housekeeping units. Ghamaty, by providing the court with a definition for "family," effectively conceded he could not lease his property unless he and his lessees formed an "integrated economic unit." (San Diego Mun. Code, § 113.0103.) In Pagard, this court explained the city was free to enact "an appropriately drawn ordinance, having due regard for the constitutional barriers to attain the municipality's laudable stated goal to protect and promote family style living. [This] ... may include for example a redefinition of 'family' to specify a concept more rationally and substantially related to the legitimate aim of maintaining a family style of living. Such definition of family should treat a 'group that bears the generic' characters of a family unit as a relatively permanent family household on an equal basis with the blood related family and thus should be equally entitled to occupy a single-family dwelling as its biologically related neighbor." (Pagard, supra, 115 Cal. App. 3d at pp. 796-797.)

Ghamaty's situation did not pertain to "family" in any sense of the word. Rather, he engaged in commercial activity prohibited by paragraph 2.6 of the Declaration, and the injunction is rationally related to Colony Hill's right to maintain its family character by prohibiting uses other than for single-family dwelling purposes. Ghamaty did not meet his burden of showing the Declaration's use restriction is unreasonable. (Nahrstedt, supra, 8 Cal.4th at p. 378.)

Additionally, Ghamaty contends the injunction violates his right to contract under the state Constitution. Article I, section 9 of the California Constitution provides that a "bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed." (Italics added; see also U.S. Const., art. I, § 10 ["No state shall ... pass any ... law impairing the obligation of

contracts”).) “ ‘A law or ordinance which substantially impairs a contractual obligation nonetheless may be constitutional. As the United States Supreme Court has noted, “[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State ‘to safeguard the vital interests of its people.’ [Citation.]” ’ ” (Mendly v. County of Los Angeles (1994) 23 Cal.App.4th 1193, 1210 [28 Cal. Rptr. 2d 822].)

“Although the federal contract clause has been interpreted to be ‘directed only against impairment by legislation and not by judgment of courts’ [citation], ... the state contract clause has been construed also to apply to judicial action.” (White v. Davis (2003) 30 Cal.4th 528, 548 [133 Cal. Rptr. 2d 648, 68 P.3d 74], citing Bradley v. Superior Court (1957) 48 Cal.2d 509, 519 [310 P.2d 634].) “[A] court cannot lawfully disregard the provisions of ... contracts or deny to either party his [or her] rights thereunder.” (Bradley v. Superior Court, at p. 519.)

Ghamaty concedes he has found no case applying the contracts clause in the context of a permanent injunction. He relies on Barrett v. Dawson (1998) 61 Cal.App.4th 1048 [71 Cal. Rptr. 2d 899], in which the issue was whether a retroactive statute impaired the right to contract. The court explained that under federal law there is a three-step analysis. “The first and threshold step is to ask whether there is any impairment at all, and, if there is, how substantial it is. [Citation.] If there is no ‘substantial’ impairment, that ends the inquiry. If there is substantial impairment, the court must next ask whether there is a ‘significant and legitimate public purpose’ behind the state regulation at issue. [Citation.] If the state regulation passes that test, the final inquiry is whether means by which the regulation acts are of a ‘character appropriate’ to the public purpose identified in step two.” (Id. at pp. 1054–1055, citing Energy Reserves Group v. Kansas Power & Light (1983) 459 U.S. 400, 410–412 [74 L. Ed. 2d 569, 103 S. Ct. 697].)

Ghamaty asserts the injunction destroys his “existing contractual relationships.” In support, he cites stipulated facts that six persons rented rooms from him for various terms. He cites no evidence that when the injunction issued any rental agreements were in force. In a deposition held approximately seven months before trial, Ghamaty testified that within the following few weeks he was going to terminate the two existing rental agreements and become the sole occupant of his home.

Ghamaty also complains that the injunction precludes him from “entering into separate contracts and dictates specific terms under which [he] must contract.” He essentially asserts the joint and several requirement of the injunction makes it impossible for him to rent out rooms as he did in the past. He claims it is unfair that he “would be required to locate renters willing to share liability for (a) the rent to be paid by all of the lessees and (b) any violations of [Colony Hill’s] rules and regulations and the [Declaration].”

To any extent the three-part test discussed in Barrett v. Dawson, supra, 61 Cal.App.4th 1048 is arguably applicable in a judicial context, it is unhelpful to Ghamaty. The injunction does not substantially impair Ghamaty’s contract right, because under paragraphs 2.6 and 2.7.8 of the Declaration he must use his home only for single-family dwelling purposes, and he has no right to rent out rooms of his home when he and the renters do not function as an “integrated economic unit,” a definition he chose and the court adopted. As the court concluded in Nahrstedt, supra, 8 Cal.4th at pages 383–384, “our social fabric is best preserved if courts uphold and enforce solemn written instruments [here the Declaration] that embody the expectations of the parties rather than treat them as ‘worthless paper’ Our social fabric is founded on the stability of expectation and obligation that arises from the consistent enforcement of the terms of deeds, contracts, wills, statutes, and other writings. To allow one person to escape obligations under a written instrument upsets the expectations of all the other parties governed by that instrument ... that [it] will be uniformly and predictably enforced. [¶] The salutary effect of enforcing written instruments and the statutes that apply to them is particularly true in the case of the declaration of a common interest development.”

III
Attorney Fees

Ghamaty contends the award of attorney fees to Colony Hill should be reversed because Colony Hill only partially prevailed on its claims against him, as it did not recover any damages, and the court refused its request for a declaration that it was entitled to approve any lessee of Ghamaty. Alternatively, Ghamaty asserts the fee award should be substantially reduced.

We conclude, however, that we lack jurisdiction to consider the matter because Ghamaty did not appeal the postjudgment order awarding attorney fees. 6 “An appellate court has no jurisdiction to review an award of attorney fees made after entry of the judgment, unless the order is separately appealed.” (Allen v. Smith (2002) 94 Cal.App.4th 1270, 1284 [114 Cal. Rptr. 2d 898].) “ [W]here several judgments and/or orders occurring close in time are separately appealable (e.g., judgment and order awarding attorney fees), each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal.” (DeZerega v. Meggs (2000) 83 Cal.App.4th 28, 43 [99 Cal. Rptr. 2d 366].)

FOOTNOTES

6 The parties did not address this issue, and we requested supplemental briefing from them on it. We have taken their responses into consideration.

The judgment here was entered on April 18, 2005, and it stated, “Award of attorney’s fees and costs shall be determined by post-judgment application.” On May 27, 2005, Colony Hill moved for an award of fees and costs; on June 17, Ghamaty filed a notice of appeal of the judgment, and it did not refer to the pending motion on attorney fees or otherwise address the issue; on July 29, the court issued a tentative ruling granting the motion, and on August 8, the court affirmed its ruling. Ghamaty did not then file a notice of appeal from the order on fees.

In asserting his notice of appeal includes the postjudgment order on attorney fees, Ghamaty relies on Grant v. List & Lathrop (1992) 2 Cal.App.4th 993 [3 Cal. Rptr. 2d 654] (Grant). In Grant, the judgment expressly awarded attorney fees to certain parties, and the amounts of the awards were left blank for later insertion by the court clerk. Thereafter, the trial court set the amounts of the awards. The Court of Appeal rejected the argument it lacked jurisdiction over the fee issue, holding that “when a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award.” (Id. at p. 998.)

Here, in contrast to Grant, the judgment did not expressly award attorney fees to Colony Hill. Rather, it left the issues of entitlement and amount for later proceedings. In considering the applicability of the Grant exception, the court in DeZerega v. Meggs, supra, 83 Cal.App.4th at page 44, explained: “The issue ... is not whether fees were ultimately recovered ‘as costs’ but whether the entitlement to fees was adjudicated by the original judgment, leaving only the issue of amount for further adjudication.” Were we to extend Grant in the manner Ghamaty urges, a prevailing party would never have to file a separate appeal from a postjudgment order granting attorney fees. That, of course, would be contrary to law.

Although notices of appeal must be liberally construed (Cal. Rules of Court, rule 1(a)(2)), we cannot construe Ghamaty’s notice of appeal to include the postjudgment order on fees. “The rule favoring appealability in cases of ambiguity cannot apply where there is a clear intention to appeal from only part of the judgment or one of two separate appealable judgments or orders. [Citation.] ‘Despite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment [or order] being appealed.’ ” (Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal. App. 3d 35, 47 [269 Cal. Rptr. 228].)

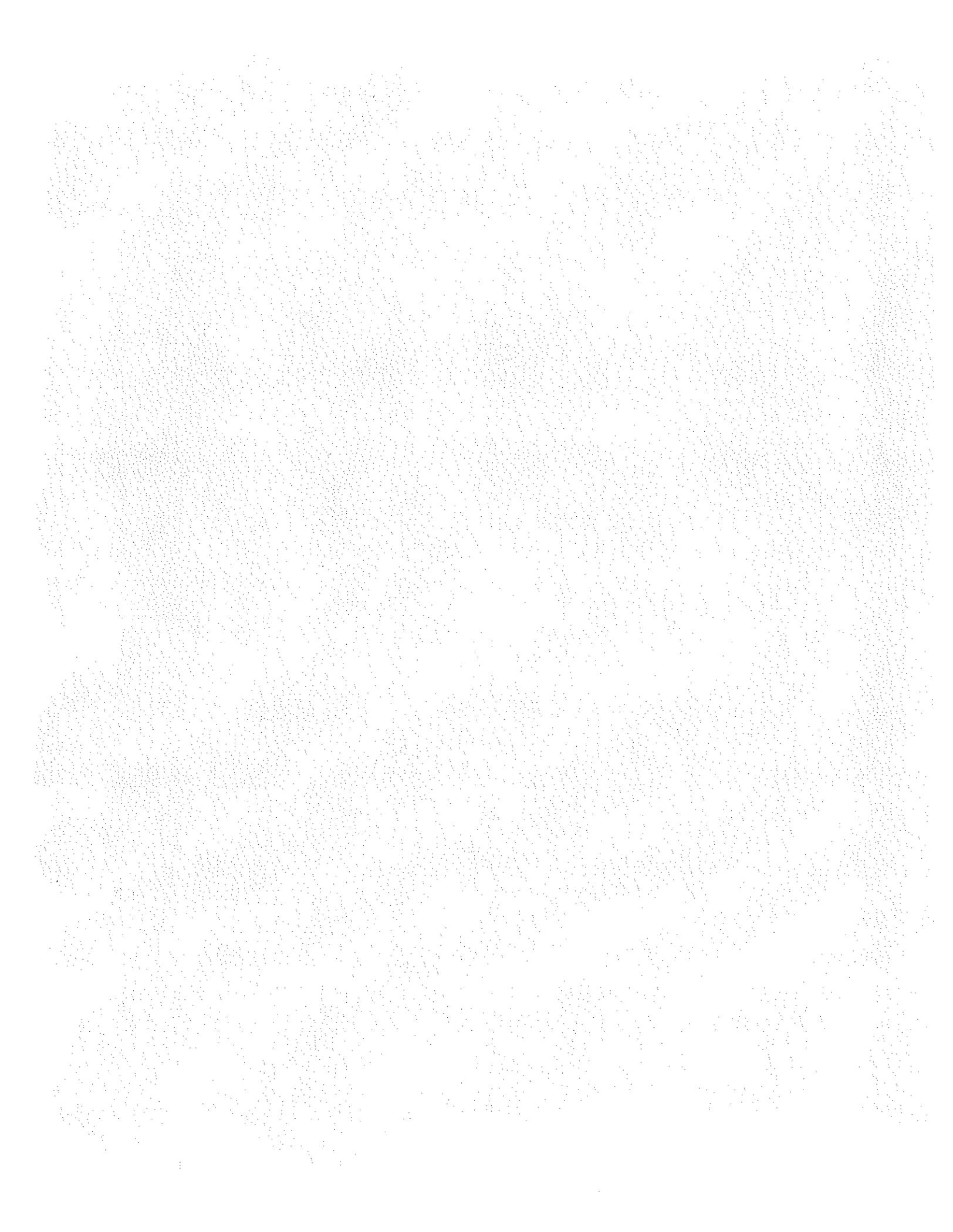
Ghamaty also contends we should consider the merits of the attorney fees issue because Colony Hill addressed the merits and did not raise the jurisdictional issue, and thus it would suffer no prejudice. Prejudice to a party, however, is not the test of whether we have jurisdiction to consider an issue.

DISPOSITION

The judgment is affirmed. The purported appeal of the attorney fees award is dismissed. Colony Hill is entitled to costs on appeal.

O'Rourke, J., and Irion, J., concurred.

On October 11, 2006, the opinion was modified to read as printed above.



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